
REPORT NO. 107 OF 2019/20

CLOSING REPORT ON AN INVESTIGATION INTO ALLEGATIONS OF IMPROPER CONDUCT, ABUSE OF POWER AND/OR MALADMINISTRATION DURING THE INVESTIGATION OF MR M J MAKWAKWA'S FINANCIAL AFFAIRS BY THE FINANCIAL INTELLIGENCE CENTRE AND THE SOUTH AFRICAN REVENUE SERVICES.
# Table of Contents

1. INTRODUCTION  
2. THE COMPLAINT  
3. POWERS AND JURISDICTION OF THE PUBLIC PROTECTOR  
4. THE INVESTIGATION  
5. THE DETERMINATION OF THE ISSUES IN RELATION TO THE EVIDENCE OBTAINED AND CONCLUSIONS MADE WITH REGARD TO THE APPLICABLE LAW AND PRESCRIPTS  
6. FINDINGS AND OBSERVATIONS  
7. REASONS FOR CLOSURE
List of Acronyms

The following abbreviations and acronyms are used throughout this report.

<table>
<thead>
<tr>
<th>Acronym</th>
<th>Description</th>
</tr>
</thead>
<tbody>
<tr>
<td>&quot;Centre&quot;</td>
<td>Financial Intelligence Centre</td>
</tr>
<tr>
<td>&quot;Complainant&quot;</td>
<td>Mr Mashudu Jonas Makwakwa.</td>
</tr>
<tr>
<td>&quot;CTR&quot;</td>
<td>Cash Threshold Reports.</td>
</tr>
<tr>
<td>&quot;DPCI&quot;</td>
<td>The Directorate for Priority Crime Investigation.</td>
</tr>
<tr>
<td>&quot;Ms Elskie&quot;.</td>
<td>Kelly Ann Elskie</td>
</tr>
<tr>
<td>&quot;Erstwhile Commissioner&quot;</td>
<td>The Commissioner of the South African Revenue Services, Mr Tom Moyane.</td>
</tr>
<tr>
<td>&quot;Erstwhile Director&quot;</td>
<td>The Director of the Centre, Mr M Michell.</td>
</tr>
<tr>
<td>&quot;FICA&quot;</td>
<td>Financial Intelligence Centre Act, 38 of 2001.</td>
</tr>
<tr>
<td>&quot;Investigation Team&quot;</td>
<td>Public Protector’s investigation team.</td>
</tr>
<tr>
<td>&quot;LRA&quot;</td>
<td>Labour Relations Act , 66 of 1995 (as amended)</td>
</tr>
<tr>
<td>&quot;PFMA&quot;</td>
<td>Public Finance Management Act, 1 of 1999.</td>
</tr>
<tr>
<td>&quot;PWC&quot;</td>
<td>Price Waterhouse Coopers</td>
</tr>
<tr>
<td>&quot;SARS&quot;</td>
<td>The South African Revenue Services.</td>
</tr>
<tr>
<td>&quot;SCOF&quot;</td>
<td>Standing Committee on Finance</td>
</tr>
<tr>
<td>&quot;STR&quot;</td>
<td>Suspicious Transaction Reports.</td>
</tr>
</tbody>
</table>
CLOSING REPORT ON AN INVESTIGATION INTO ALLEGATIONS OF IMPROPER CONDUCT, ABUSE OF POWER AND/OR MALADMINISTRATION DURING THE INVESTIGATION OF MR M J MAKWAKWA'S FINANCIAL AFFAIRS BY THE FINANCIAL INTELLIGENCE CENTRE AND THE SOUTH AFRICAN REVENUE SERVICES.

1. INTRODUCTION

1.1. This is my report issued in terms of section 182(1)(b) of the Constitution and section 8(1) of the Public Protector Act.

1.2. This report relates to my investigation into allegations of improper conduct, abuse of power and/or maladministration during the investigation of the Complainant's financial affairs by the Centre and during the subsequent investigations undertaken by the SARS following the receipt of a referral from the Centre.

2. THE COMPLAINT

2.1. The complaint was lodged by the former SARS' Chief Operations Officer: Business and Individual Taxes, Mr Mashudu Jonas Makwakwa, the Complainant, on 24 February 2017 alleging, inter alia, the following:

2.1.1. That there was an abuse of process by the former Director of the Centre and/or delegated / authorised officials, during the investigation of his financial affairs, in that the investigation was conducted contrary to the provisions of FICA;

2.1.2. That there was unlawful disclosure of the Centre's referral of the financial intelligence (the referral) to SARS by the officials of the Centre or its officials and/or SARS or its officials. The officials involved in the unlawful disclosure directly or indirectly caused details contained in the referral to be published in the
print media and on digital media platforms, resulting in his personal and professional prejudice;

2.1.3. That SARS’ investigation by Hogan Lovells and the PWC into his tax affairs was irregular and extended beyond its powers in that the sharing of his banking and tax information constituted a violation of the Tax Act. SARS also failed to properly distinguish between his statuses, i.e. his capacity as an employee and his capacity as a taxpayer;

2.1.4. That the erstwhile Commissioner, failed to respond to the concerns he raised with him through a letter from his lawyer, Liezel David, dated 10 August 2016; and

2.1.5. That his ex-wife, Ms M A Tholonyane, abused her position as an employee of SARS, as well as SARS resources, to either conduct an investigation into his financial affairs, or to cause such an investigation to be conducted by the Centre and no action was taken against Ms Tholonyane in this regard.

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

3.1 The Public Protector was established under section 181(1)(a) of the Constitution to strengthen constitutional democracy through investigating and redressing improper conduct in state affairs. Public Protector is an independent constitutional body established under 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 power as regulated by national legislation –
(a) 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,

(b) to report on that conduct; and

(c) to take appropriate remedial action”.

3.3 Section 182(2) directs that the Public Protector has additional powers and functions prescribed by legislation.

3.4 This matter was reported to me within two (2) years of its occurrence and therefore I did not have to exercise my discretion in terms of section 6(9) of the Public Protector before deciding to investigate it. Firstly, the issues raised by the Complainant in his complaint concerned an investigation that was conducted by the Centre which subsequently issued a referral to SARS dated 17 May 2016. The Complainant became aware of the Centre’s investigation sometime during the course of 2016. Secondly, the Complainant raised issues concerning the investigations conducted by SARS following the receipt of the aforesaid referral. SARS investigations commenced sometime during the course of 2016. My office received the Complainant’s complaint on 24 February 2017, within two years of the occurrence of both incidents.

3.5 The institutions mentioned in this report, viz, the Centre and SARS are organs of state and their conduct amount to conduct in state affairs, as a result the complaints fall within the ambit of the Public Protector’s mandate. Accordingly, the Public Protector has the power and jurisdiction to investigate and take appropriate remedial action in the matter under investigation.

3.6 The office of the Public Protector is declared by the Constitution to be one that is independent and impartial, and the Constitution demands that its powers must be
exercised 'without fear, favour or prejudice'.¹ Those words are not mere material for rhetoric, as words of that kind are often used. The words mean what they say. Fulfilling their demands will call for courage at times, but it will always call for vigilance and conviction of purpose.

4. **THE INVESTIGATION**

4.1 **Methodology**

4.1.1 The main investigation was conducted in terms of section 182 of the Constitution and sections 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 Like every Public Protector investigation, the investigation was approached using an enquiry process that seeks to find out:

- What happened?
- What should have happened?
- Is there a discrepancy between what happened and what should have happened and does that deviation amounts to maladministration?
- In the event of maladministration what would it take to remedy the wrong or to place the Complainants as close as possible to where they would have been but for the maladministration or improper conduct?

¹ Section 181(2) of the Constitution.
4.2.2 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 the roles played by the Centre during the processing of the Complainant’s STRs and CTRs reports and the subsequent disciplinary and tax related investigations conducted against the Complainant by SARS following the receipt of the Centre’s referral to SARS.

4.2.3 The enquiry regarding what should have happened, focuses on the law or rules that regulate the standard that should have been met by the officials of the Centre and SARS.

4.2.4 The enquiry regarding the remedy or remedial action seeks to explore options for redressing the consequences of maladministration. Where the Complainant has suffered prejudice, the idea is to place him or her as close as possible to where he would have been had the institutions concerned complied with the regulatory framework setting the applicable standards for good administration.

4.3 Notice issued in terms of section 7(9) of the Public Protector Act.

4.3.1 During the investigation process, I issued notices\(^2\) in terms of section 7(9)(a) of the Public Protector Act (Notice) to the Director of the Centre on 5 September 2019, the Commissioner of SARS on 6 September 2019, the erstwhile Commissioner of SARS on 6 September 2019, to afford them an opportunity to respond to my provisional findings. All the institutions and affected persons served with a Notice were to respond within 10 working days upon receipt of the Notice.

\(^2\) Dated 03 September 2019
4.3.2 I received a written response dated 13 September 2019 from the Commissioner of SARS on the same day and an original copy of the response on 16 September 2019. I received further submission from SARS dated 25 October 2019 following a meeting on between the two offices on 11 October 2019.

4.3.3 I received a written submission from the Complainant on 16 September 2019 in response to my discretionary letter dated 3 September 2019.

4.3.4 I also received a written response to the Notice from the Director of the Centre on 27 September 2019. Lastly I received a written response to the Notice from the erstwhile Commissioner of SARS on 28 September 2019.

4.3.5 I also engaged with the erstwhile Commissioner of SARS on 11 February 2020 in order to further obtain clarity regarding his additional response to the Notice received on 7 January 2020.

4.3.6 The submissions received in response to the Notices were fully considered in this report.

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

4.4.1 Whether Centre improperly launched an investigation against the Complainant in contravention of the provisions FICA;

4.4.2 Whether the Centre’s referral to SARS was actioned in contravention of the FICA and thus constituted maladministration;

4.4.3 Whether SARS abused its power when it sanctioned investigations against the Complainant by Hogan Lovells and the PWC;
4.4.4 Whether SARS and/or the erstwhile Commissioner improperly disclosed the Centre’s confidential information to the Complainant and improperly failed to respond to a request for information by the Complainant;

4.4.5 Whether Ms T A Tholonyane abused her power as an employee of SARS to either conduct an investigation into the Complainant’s financial affairs or caused such investigation to be conducted by the Centre;

4.4.6 Whether SARS improperly disclosed the Centre’s referral to the media; and

4.4.7 Whether the Complainant was improperly prejudiced by the conduct of the Centre and or SARS.

4.5 The Key Sources of information

4.5.1 Documents

4.5.1.1 Complainant’ document received through an email dated 24 February 2017.
4.5.1.2 Baker & McKenzie letter dated 23 January 2017 addressed to SARS.
4.5.1.3 Complainant’s affidavit with annexures dated 6 April 2017.
4.5.1.4 Copy of a letter by Liezel David Attorneys dated 10 August 2016 addressed to the erstwhile Commissioner, Mr Tom Moyane.
4.5.1.5 Copy of a letter by Liezel David Attorneys dated 22 August 2016 addressed to the erstwhile Commissioner, Mr Tom Moyane.
4.5.1.6 Copy of SARS’s letter dated 22 August 2016 addressed to the former Director of the Centre, Mr Murray Michell.
4.5.1.7 A copy of SARS’s letter dated 07 September 2016 addressed to the former Director of the Centre, Mr Murray Michell.
4.5.1.8 A copy of SARS’s letter dated 19 September 2016 addressed to the former Director of the Centre, Mr Murray Michell, in connection with the referral of financial intelligence for Investigation: Ref 0377/2015.

4.5.1.9 PWC Report-Investigation into Transactions Identified by the Financial Intelligence Centre Relating to Mr MJ Makwakwa and Ms KA Elskie, dated 09 March 2017.

4.5.1.10 Hogan Lovells Final Report: Investigation into Allegations Contained in the FIC Report: MJ Makwakwa and KA Elskie, dated 16 May 2017

4.5.1.11 Hogan Lovells report dated 23 May 2018 to SCOF.

4.5.1.12 SARS report dated 03 July 2018 into the Complainant’s complaint against Ms Tlholonyane.

4.5.1.13 Copy of a letter dated 3 August 2018 from Hogan Lovells to Law Society of the Northern Provinces.

4.5.2 **Meetings /Interviews conducted**

4.5.2.1 Meeting between the Investigation Team and SARS’ team headed by the then Acting Commissioner for SARS.

4.5.2.2 Interview between the Investigation Team and Ms M Tlholonyane on 27 June 2019.

4.5.2.3 Meeting between the Public Protector and SARS’ team headed by the Commissioner for SARS, Mr Kieswetter on 11 October 2019.

4.5.2.4 Interview between the Public Protector and the erstwhile Commissioner on 11 February 2020

4.5.3 **Correspondence sent and received**

4.5.3.1 Letter from Public Protector addressed to Mr T Moyane (SARS) dated 17 May 2017.
4.5.3.2 Letter from Public Protector addressed to Mr M Michell (Centre) dated 17 May 2017.

4.5.3.3 Letters from the Centre dated 30 May 2017, 07 June 2017, addressed to the Public Protector.

4.5.3.4 Hogan Lovells letter dated 13 July 2017 addressed to the Public Protector at the behest of SARS.

4.5.3.5 Letter from Public Protector addressed to Ms X Khanyile (Centre) dated 17 May 2017.

4.5.3.6 Letter from the Centre dated 29 June 2017 addressed to the Public Protector.

4.5.3.7 Letter from C da Silva (SARS) dated 27 March 2019 addressed to the Public Protector.

4.5.3.8 Email from Mr. A Sigama (SARS) dated 27 March 2019 addressed to the Public Protector.

4.5.3.9 Letter from Public Protector addressed to Ms X Khanyile (Centre) dated 29 May 2019.

4.5.3.10 Letter from Mr Xolile Majija (Centre) dated 14 June 2019 addressed to the Public Protector.

4.5.3.11 Letter from the Public Protector addressed to L.Gen G. Lebeya (DPCI) dated 19 August 2019.

4.5.3.12 Letter from the DPCI addressed to Public Protector dated 30 August 2019.

4.5.3.13 Notices to the Centre, SARS and the erstwhile Commissioner.

4.5.3.14 SARS response to the Notice dated 13 September 2019.

4.5.3.15 Complainant’s response to discretionary notice received via email dated 16 September 2019.

4.5.3.16 Letter from Adv Xolisile Khanyile (Centre) dated 27 September 2019 dated addressed to the Public Protector.

4.5.3.17 Erstwhile Commissioner’s response to the Notice received via email dated 28 September 2019 and 7 January 2020.

4.5.4 Legislation and other prescripts
4.5.4.2 The Public Protector Act, no. 23 of 1994.
4.5.4.3 Financial Intelligence Centre Act, 38 of 2001.
4.5.4.4 Public Finance Management Act, 1 of 1999.
4.5.4.5 Labour Relations Act, 66 of 1995.
4.5.4.7 Tax Administration Act, 28 of 2011.

4.5.5 Case Law

4.5.5.1 The Public Protector v Mail & Guardian Ltd (422/10) [2011] ZASCA 108 (1 JUNE 2011).
4.5.5.2 Minister of Home Affairs v The Public Protector of South Africa (308/217) [2018] ZASCA 15 (15 March 2018).
4.5.5.3 President of the Republic of South Africa v Office of the Public Protector and Others, Case no 91139/2016 (13 December 2017).

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 Whether the Centre improperly launched an investigation against the Complainant in contravention of the provisions of FICA.

Common cause issues:

5.1.1 It is common cause that the Centre instituted an investigation into the Complainant’s financial affairs and/or processed the STRs and CTRs concerning the Complainant.
5.1.2 The main issue for my determination is whether the Centre improperly launched an investigation against the Complainant in contravention of the provisions of FICA.

**Issues in dispute**

5.1.3 In his affidavit dated 6 April 2017 to my office, the Complainant deposed as follows:

3.2 "The abuse of process by the Director of the FIC and/or delegated/authorised FIC officials, contrary to the provisions of the FIC Act in respect of:

3.2.1 Launching an inquiry and/or investigation into transactions as far back as 6 years ago and retrospectively reviewing such transactions without the contemporaneous generation of cash threshold reports (CTRs) and suspicious transaction reports (STRs) as required by the FIC Act;

3.2.2 Improperly conducting the investigation by collecting/gathering information or evidence in contravention of the FIC Act, for example section 26(1) and (2) of the FIC Act, without first obtaining a warrant to obtain certain records in possession of accountable institutions, including but not limited to the banks where my own and related parties’ personal accounts are held, and thereby infringing my right to privacy;

3.2.3 Incorporating information in the FIC report (sic) which could only be obtained without utilising the provisions of the FIC Act and therefore obtained through illegal means, such as my payment of R200 000 to
Mercedes Benz Financial Services for the purchase of a vehicle; video footage of me performing financial transactions;

3.2.4 Drawing conclusions in the FIC report, strained to such extend in order to provide a basis for the farfetched allegations of suspicious financial conduct on my part and other innocent parties without showing any rational connection between the parties and the underlying transactions, all of which is encapsulated in the preposterous assertion that I am dependent on suspicious deposit and payments to maintain my current standard of living and that I may be involved in corrupt activities;

3.2.5 Overall the FIC exceeded its investigation remit to the extent that it is plainly clear that it was motivated by nefarious considerations which amounts to a patent abuse of power."

5.1.4 The Complainant alleged that his ex-wife, Ms M A Tlholonyane, an employee of SARS, could have been involved in reporting his financial matters to the Centre, which caused the Centre to initiate an investigation against him.

5.1.5 Through a letter dated 17 May 2017 directed to the erstwhile Director, I requested him to explain, inter alia, the basis for the decision to scrutinise the Complainant’s financial affairs and/or to initiate an investigation against him. In its response dated 29 June 2018, the Centre categorically stated that it did not receive a complaint from the Complainant’s ex-wife.

5.1.6 During an interview with Ms Tlholonyane on 27 June 2019, she reported that between 2012 and 2015 she was managing a team that would, in their ordinary course of business, request tax information of individuals from the Centre. At no stage during that period did she or anyone from her team request the
Complainant’s tax information from the Centre. She also submitted that she did not report or lodge a complaint against the Complainant with the Centre.

5.1.7 The Centre reported that it received CTRs and STRs concerning the Complainant and Ms Elskie. The Centre analysed the CTRs and STRs as it was obliged to do so and found that there were unusual transactions in the Complainant’s and Ms Elksie’s bank accounts. However, the Centre contended that a disclosure of its sources of information to my office was likely to jeopardise the functioning of the Centre and elected not to disclose the sources of information in this instance.

5.1.8 The Complainant believes that the Centre did not comply with the process prescribed in section 26 of FICA. It is clear from the aforementioned section that the employees of the Centre who examined and made copies of his bank records could only do so after obtaining a warrant issued by either a judge, regional magistrate or magistrate.

5.1.9 The Complainant contended that the Centre’s officials did not undergo the necessary security screening as required by section 12 of FICA. In this regard, only authorised personnel in possession of the required security clearance certificate are allowed to carry out investigations on behalf of the Centre.

5.1.10 The Centre’s submission was that in order for the Centre to discharge its mandate, it relies on accountable and reporting institutions to further the objectives of the Centre by identifying and reporting suspicious and unusual transactions. Section 28 of FICA places the duty on all accountable institutions to report cash transactions that are above R24 999.99. The section further requires all accounting institutions to report all suspicious and unusual transactions.

5.1.11 Once the bank picks up cash deposits above the legal threshold, it has a duty to report to the Centre within 15 days of becoming aware of such a transaction. The
Complainant argued that in his case, all transactions in question relate to transactions concluded as far back as 2010. However, the investigation into his affairs only started at the end of 2015, almost five (5) years after some of the transactions had been concluded. Further thereto, some of the amounts were as small as R100.00 and did not trigger the threshold amount of R24 999.99.

5.1.12 If the bank had reported the transactions as required, the Centre should have conducted its investigations soon after the suspicious and unusual transactions were reported. In its response dated 14 June 2019, the Centre reiterated that the reports of suspicious and unusual transactions were only received in 2016. However, the Centre disagreed with the Complainant’s suggestion that it was not obliged in law to investigate and report on the issues contained in the CTRs and the STRs simply because they were only received in 2016.

5.1.13 It was on this premise that the Complainant believed that he was specifically targeted and that the release of the Centre’s referral to SARS was not to further its objectives, but to impugn his integrity as part of a malicious agenda.

5.1.14 In its referral to SARS, the Centre reported that there were seventy five (75) cash deposits totalling R785 130.00 deposited into the Complainant’s personal bank account between 1 March 2010 and 31 January 2016. Of the 75 cash deposits, forty eight (48) amounting to R726 400.00 were deposited between 2014 and 2015.

5.1.15 The Centre also highlighted suspicious and unusual payments amounting to a total of R480 000.00 electronically transferred by Biz Fire Worx (Pty) Ltd (Biz Fire Worx ) into the Complainant’s personal bank account as follows:

- R150 000.00 and R200 000.00 on 9 April 2015; and
- R130 000.00 on 07 May 2015.
5.1.16 The Centre’s referral also highlighted that six (6) days after receiving the last payment from Biz Fire Worx on 13 May 2015, the Complainant made an EFT payment of R 200 000.00 from his personal bank account to Mercedes Benz Financial Service for a Mercedes Benz C220 BLUETEC (Licence DR93JXGP), in favour of Ms Elskie.

5.1.17 In its response to my office dated 28 June 2019, the Centre submitted that:

“It is not the Centre’s conclusion that the aforesaid payment constitutes illegal conduct. The Centre referred the matter to the SARS for investigation, in particular, to determine the lawfulness of the transaction…

If it is contended that there is no link, the only apparent conclusion must be that the aforesaid payment was for no value received by Mr Makwakwa. Such a contention in any event justifies the referral to the SARS for investigation”.

5.1.18 It is worth noting that, although the Centre regarded my office as one of the institutions to whom the Centre is in law obliged to “make information collected by it available”, it would only do so in order to facilitate the administration of the laws of the Republic of South Africa. However, the Centre did not provide some of the information requested, including the details of the sources of the CTRs and STRs.

5.1.19 The issue of whether or not the initiation of the investigation against the Complainant was improper will be addressed by having due regard to the relevant legal framework discussed hereunder.

Application of the relevant legal framework
5.1.20 The Centre was established in terms of section 2 of FICA. Its principal objective in terms of section 3(1) of FICA is "to assist in the identification of the proceeds of unlawful activities and the combatting of money laundering activities and the financing of terrorist and related activities."

5.1.21 The phrase "unlawful activity" is defined in section 1 of FICA with reference to the meaning given to it in section 1 of POCA wherein it is defined as "conduct which constitutes a crime or which contravenes any law whether such conduct occurred before or after the commencement of this Act and whether such conduct occurred in the Republic or elsewhere."

5.1.22 Section 28 of FICA reads thus:

"An accountable institution and a reporting institution must, within the prescribed period, report to the Centre the prescribed particulars concerning a transaction concluded with a client if in terms of the transaction an amount in excess of the prescribed amount-
(a) is paid by the accountable institution or reporting institution to the client, or a person acting on behalf of the client is acting; or
(b) is received by the accountable institution or reporting institution from the client, or from a person acting on behalf of the client, or from a person on whose behalf the client is acting"

5.1.23 Section 29 of FICA states that:

(1) "A person who carries on a business or in charge of or manages a business or who is employed by a business and knows or ought reasonably to have known or suspected that ---"
(a) The business has received or is about to receive the proceeds of unlawful activities or property which is connected to an offence relating to the financing of terrorist and related activities;

(b) A transaction or series of transactions to which the business is a part-

(i) Facilitated or is likely to facilitate the transfer of the proceeds of unlawful activities or property which is connected to an offence relating to the financing of terrorist and related duty under this Act; or

(ii) Has no apparent business or lawful purpose;

(iii) Is conducted for the purpose of avoiding giving rise to a reporting duty under this Act

(iv) May be relevant to the investigation of an evasion or attempted evasion of a duty to pay any tax, duty or levy imposed by legislation administered by the Commissioner for the South African Revenue Service; or

(v) Relates to an offence relating to the financing of terrorist and related activities; or

(c) The business has been used or is about to be used in any way for money laundering purposes or to facilitate the commission of an offence relating to the financing of terrorist and related activities, must, within the prescribed period after the knowledge was acquired or the suspicion arose, report to the Centre the grounds for the knowledge or suspicion and the prescribed particulars concerning the transaction or series of transactions.

(2) A person who carries on a business or is in charge of a or manages a business or who is employed by a business and who knows or suspects that a transaction or a series of transactions about which enquiries are made, may, if that transaction or those transactions had been conclude, have caused any of the consequences referred to in subsection (1)(a),
(b) or (c), must within the prescribed period after the knowledge was acquired or the suspicion arose, report to the Centre the grounds for the knowledge or suspicion and the prescribed particulars concerning the transactions or series of transactions.

(3) No person who made or must make a report in terms of this section may disclose that fact or any information regarding the contents of any such report to any other person, including the person in respect of whom the report is or must be made-

(a) Within the scope of the powers and duties of that person in terms of any legislation.

(b) For the purpose of carrying out the provisions of this Act;

(c) For the purpose of legal proceedings, including any proceedings before a judge in chambers; or

(d) In terms of an order of court

(4) No person who knows or suspects that a report has been or is to be made in terms of this section may disclose that knowledge or suspicion or any information regarding the contents or suspected contents of any such report to any other person, including the person in respect of whom the report is or is to be made than-

(a) Within the scope of that person’s powers and duties in terms of any legislation.

(b) For the purpose of carrying out the provisions of this Act

(c) For the purpose of legal proceedings, including any proceedings before a judge in chambers; or

(d) In terms of an order of court".

5.1.24 Regulation 22B of the FICA Regulations states that

"The prescribed amount of cash above which a transaction must be reported to the Centre under section 28 of the Act is R24 999.99 or an aggregate of
smaller amounts which combine to come to this amount if it appears to the accountable institution or reporting institution concerned that the transactions involving those smaller amounts are linked to be considered fractions of one transaction”.

5.1.25 The above regulation, read with section 28 of FICA, requires the reportable transaction to be R24 999.99, but also smaller amounts aggregating to the aforesaid amount. In this regard, the Complainant’s argument that in his case amounts smaller than R24 999.99 were also considered and therefore improper is not consistent with regulation 22B of FICA Regulations.

5.1.26 Regulations 24(3) & (4) of the FICA Regulations provides as follows:

(3) “A report under section 29 of the Act must be sent to the Centre as soon as possible but not later than fifteen days after a natural person or any of his or her employees, or any of the employees or officers of a legal person or other entity, has become aware of a fact concerning a transaction on the basis of which knowledge or a suspicion concerning the transaction must be reported, unless the Centre has approved of the report being sent after the expiry of this period.

(4) A report under section 28 of the Act must be sent to the Centre as soon as possible but not later than 2 days after a natural person or his or her employees, or any of the employees of a legal person or other entity, has become aware of a fact of a cash transaction or series of cash transactions that has exceeded the prescribed limit”.

5.1.27 The Complainant contended that the transactions in question were very old and the investigation thereof was tantamount to abuse of power or process and in contravention of the above provisions.
5.1.28 The Centre confirmed that it received the reports in 2016 and therefore outside the prescribed periods mentioned above. Further thereto, there was no indication whether the approval of the reports in terms of section 29 of FICA was done in terms of above regulation in respect to reports received outside the prescribed period of 15 days.

5.1.29 It should be noted that whereas the Centre can approve reports in terms of 29 of FICA received outside the prescribed period, there is no such approval permissible for reports received in terms of section 28 of FICA. There was no evidence presented to this investigation showing that the reports to the Centre were made within the prescribed period of 2 days.

5.1.30 Section 26 of FICA states that:

(1) "An authorised representative of the Centre has access during ordinary working hours to any records kept by or on behalf of an accountable institution in terms of section 22 or section 24, and may examine, make extracts from or copies of, any such records for the purposes of obtaining further information in respect of a report made in terms of section 28, 28A. 29, 30(1) or 31.

(2) The authorised representative of the Centre may, in the case of records which the public is entitled to have access to, exercise the powers mentioned in subsection (1) only by virtue of a warrant issued in chambers by a magistrate or a regional magistrate or judge of an area of jurisdiction within which records or any of them are kept, or within which the accountable institution conducts business.
(3) A warrant may be issued if it appears to the judge, magistrate or regional magistrate from information on oath or affirmation that there are reasonable grounds to believe the records referred to in section (1) may assist the Centre to identify the proceeds of unlawful activities or to combat money laundering activities.

(4) A warrant issued in terms of this section may contain such conditions regarding access to the relevant records as the judge, magistrate or regional magistrate may deem appropriate”.

5.1.31 The Complainant submitted that the Centre did not comply with section 26 of FICA in that no warrant was obtained before his records were accessed from the accountable institution.

5.1.32 The Centre did not avail any evidence to discount the Complainant’s allegations nor demonstrated compliance with section 26 of FICA during its investigation. Equally the Complainant did not provide details of the centre’s failure to comply with the section.

5.1.33 Section 12 of FICA states that:

(1) “No person other than the Director may be appointed or seconded to perform the functions of the Centre unless-

(a) Information with respect to that person has been gathered in a security screening investigation by the National Intelligence Agency established by section 3 of the Intelligence Services Act, 1994 (Act No. 38 of 1994); and

(b) The Director, after evaluating the gathered information, is satisfied that such person may be so appointed without the possibility that
such person might be a security risk or that he or she might act in any way prejudicial to the objectives or functions of the Centre.

(2) If the Director is so satisfied, Director must issue a certificate with respect to such person in which it is certified that such person has successfully undergone a security clearance.

(3) ...

(4) ....

(5) If the certificate referred to in subsection (2) is withdrawn, the person concerned may not perform any functions at the Centre and the Director must discharge him or her from the Centre."

5.1.34 It was the Complainant’s contention that official(s) seized with his investigation did not undergo the requisite screening investigation by the State Security Agency and did not possess the certificate in terms of section 12(2) of FICA from the Director.

5.1.35 The Centre neither availed any evidence to discount the Complainant’s allegations nor demonstrate compliance with section 12 of FICA during its investigation.

Conclusion

5.1.36 In the circumstances, I could not conclude that the investigation into the Complainant’s financial affairs was not done in compliance with sections 12, 26, 28 and 29 of FICA and FICA Regulations.

5.1.37 The Centre did not provide evidence that the officials who were seized with the investigation in question had been issued with the certificate referred to in section 12 of the FICA.
5.1.38 The Centre did not provide evidence that it obtained the necessary warrants before accessing the Complainant’s bank record in line with section 26 of FICA.

5.1.39 No evidence was submitted to this investigation showing that the prescribed periods in terms of regulations 24(3) & (4) of the FICA Regulations were adhered to.

5.2 The Centre’s response to the Public Protector’s Notice dated 27 September 2019

At paragraphs 1-5 of the response

5.2.1 In its response, the Centre made reference to its letters dated 29 June 2018 and 14 June 2019 and indicated that at no stage did it refuse to co-operate with my investigation. The Centre also submitted that it requested clarification on certain issues relevant to this investigation and had not received the necessary clarification. Consequently it was impossible to meaningfully respond to all the issues in respect of which I had requested the answers.

5.2.2 In paragraph 2 of the its letter dated 14 June 2019, the Centre wrote:

“In addition to considering your letter dated 25 May 2019, we have considered your previous correspondence, amongst others, to understand the complaint and the relevance of the issues raised in your letter under reply to the allegations which form the basis of the complaint. This was also necessary to enable us to meaningfully respond to your letter under reply”.

5.2.3 The Centre also submitted that the information contained in the Notice suggested that my investigation was wider than what the Centre was initially made to understand.
5.2.4 I maintain that the letters sent to the Centre provided sufficient details to enable it to respond. On that basis there was no need to provide clarification as contended by the Centre. This is particularly because the questions raised with the Centre, related to whether the investigation conducted against the Complainant was done in line with FICA, particularly the different sections which were drawn from the complaint and were quoted in the said letters.

5.2.5 However, I concur with the Centre’s submission that I did not provide it with the actual complaint from the Complainant. I must hasten to add that there is nothing in section 7 of the Public Protector which requires me to do so. The aforementioned section as confirmed in the Minister of Home Affairs case allows me to determine what to investigate and how to investigate it. I am therefore inclined to dismiss the Centre’s submission that it did not have sufficient particulars to enable it to respond to the issues I wanted it to respond to.

5.2.6 The Centre contended that I had no basis to make adverse findings against it. I will address this issue in the subsequent paragraphs.

At paragraphs 6-12 of the response

5.2.7 In its response, the Centre denied that it launched its investigation in contravention of FICA. It submitted that the Centre is not an investigative body, but one of its objectives is to assist in the identification of unlawful activities. To achieve this objective, the Centre collects information, interprets and analyses it for the purposes of assisting the mandated entities to conduct their own investigations.

5.2.8 The Centre submitted that section 28 and 29 of FICA do not govern the conduct of the Centre, but that of ‘accountable institution’ (as per Schedule 1 of FICA) and
'reporting institution' (as per Schedule 3 of FICA). In this regard, section 28 of FICA imposes an obligation upon a reporting institution to report to the Centre 'the prescribed particulars concerning a transaction' involving 'an amount of cash in excess of the prescribed amount' and to do so within the prescribed time period.

5.2.9 The Centre indicated that section 29 of FICA applies to a 'person who carries on a business...and knows or ought reasonably to have known or suspected' certain things and imposes certain obligations upon such a person.

5.2.10 In view of the above, the Centre contended that it could not contravene sections 28 and 29 of FICA.

5.2.11 The Centre contended that the provisions of FICA, upon which I sought reliance, do not empower it to ignore reports made to it. In paragraph 10 of its response, the centre wrote

"When regard is had to the purpose of the FIC Act and the objectives which it seeks to achieve, the Centre cannot arbitrarily refuse to act on reports made to it without being empowered to do so."

5.2.12 It was the Centre's contention that it was entitled to proceed on the basis that the reporting of transactions is unlawful unless advised otherwise.

5.2.13 I have considered the substance of the Centre's submission which is to the effect that the timelines prescribed in the FICA Regulations applies to the 'accountable institution' and the 'reporting institution' and persons identified in section 29 of FICA and not the Centre.
5.2.14 The argument I made in line with the Complainant’s allegations was that there was no evidence showing that the Centre received the reports in terms of section 28 of FICA in compliance with the prescribed period of two (2) days and that the reports received in terms of section 29 of FICA were received within the prescribed period of fifteen (15) days. Therefore, there was no consideration of whether the accountable institution or the reporting institution or persons defined in section 29 of FICA were complying with the prescribed timelines stipulated in the FICA Regulations.

5.2.15 As illustrated in my Notice, regulation 24(4) of FICA Regulations specifically required the Centre to approve the report in terms of section 29 of FICA received after the prescribed period of fifteen (15) days.

5.2.16 The Centre did not adduce any argument and/or evidence to suggest that it received the reports within the prescribed timelines. Although sections 28 and 29 of FICA does not regulate the Centre’s conduct, this begs the question whether or not the aforesaid non-compliance by the accountable and reporting institutions and persons identified in section 29 of FICA, renders the Centre’s processes irregular. The Centre’s argument seems to suggest that FICA does not prevent it to process the reports received outside the prescribed periods. Further thereto, disregarding the said reports will be acting contrary to the objective and purpose of FICA.

5.2.17 I am persuaded that sections 28 and 29 of FICA places obligations on the accountable and reporting institutions and persons identified in section 29 of FICA and therefore seek to regulate their conduct and not that of the Centre. I am also persuaded that disregarding the STRs and CTRs on the basis of non-compliance with the prescribed periods would have undermined the principal objective of the Centre, which is to “assist in the identification of the proceeds of unlawful activities
and the combating of money laundering activities and the financing of terrorist and related activities\(^3\).

5.2.18 Furthermore, I could not find any provision in FICA which precluded the Centre from processing, analysing and interpreting the reports it received concerning the Complainant.

\textit{At paragraphs 13-14 of the response}

5.2.19 The Centre confirmed that it received the report of seventy-five (75) cash deposits in 2016.

5.2.20 The above information confirmed that the reports were not received in line with the prescribed periods as discussed above and as contended by the Complainant.

\textit{At paragraphs 15-16 of the response}

5.2.21 The Centre reiterated its submission that it did not contravene sections 28 and 29 of FICA. Therefore, it will not be necessary for me to repeat the above discussion.

\textit{At paragraphs 17 of the response}

5.2.22 In its response, the Centre ostensibly raised an argument that I did not have evidence showing that the officials who conducted the investigation did not possess the necessary clearance certificate.

\(^3\) Section 3(1) of FICA
5.2.23 The Centre’s obligation under section 7 of the Public Protector Act is to provide me with information that will assist in the investigation of a matter concerned. The fact that the Centre evaded the Complainant’s allegations about compliance with section 12 of FICA, should not be considered as failure to the aforementioned obligation.

5.2.24 The Complainant’s allegations that the officials seized with this matter did not have the requisite security clearance was not corroborated by the necessary details to enable a deeper probe on the matter.

5.2.25 Notwithstanding the aforesaid, my reading of section 12 of FICA relates to the appointment of the Centre’s officials and does place this as a requirement to what would constitute a proper processing of STRs and CTRs received by the Centre.

5.2.26 Bearing in mind that the objectives and the functions of the Centre as encapsulated in sections 3 and 4 of FICA⁴, I am not persuaded that the vetting or non-vetting of officials invalidates the work of the Centre or can be regarded as abuse of power. I have also taken cognisance of the fact that the Centre’s work is only a precursor of a process that should be completed by investigating authorities who receive its reports or referrals.

*At paragraphs 18-19 of the response*

5.2.27 The Centre submitted that it did not have to obtain a warrant in terms of section 26 of FICA because, in dealing with the Complainant matter, it acted in terms of section 32 of FICA which read thus:

---

⁴ Section 3(1) of FICA states that: “The principal objective of the Centre is to assist in the identification of the proceeds of unlawful activities and the combating of money laundering activities and the financing of terrorist and related activities”

Section 4 (b) of FICA provides that: “To achieve its objectives the Centre must –Inform, advise and cooperate with investigating authorities, supervisory bodies, the South African Revenue Services and the Intelligence services”
(1) “A report in terms of section 28, 29 or 31 to the Centre and a report in terms of section 30(1) to a person authorised by the Minister must be made in the prescribed manner.

(2) The Centre may request an accountable institution, a reporting institution or any other person that has made a report in terms of section 28, 29 or 31 to furnish the Centre with such additional information, including prescribed information relating to transactional activity and supporting documentation, concerning the report and the grounds for the report as the Centre may reasonably require for the performance by it of its functions.

(3) When an institution or a person referred to in subsection (2) receives a request under that subsection, that institution or person must furnish the Centre in the prescribed manner and within the prescribed period with such additional information concerning the report and the grounds for the report as that institution or person may have available”.

5.2.28 The Centre is empowered by section 32(2) of FICA to request ‘accountable institution, a reporting institution or any other person that has made a report in terms of section 28, 29 or 31 to furnish the Centre with such additional information’. Therefore, any additional information in respect of the reports received would not require the Centre to access it through a warrant as envisaged in section 26 of FICA.

5.2.29 In light of the above submission and in the absence of any other contradictory information at my disposal, I am inclined to conclude that there was no evidence to suggest that the Centre failed to comply with section 26 of FICA, since the records were accessed in terms of section 32 of FICA.

At paragraphs 20-23 of the response
5.2.30 The Centre contended that its conduct did not constitute improper conduct and maladministration.

5.2.31 The Centre further submitted that I did not independently consider its representations made through its letters or indicate why I rejected the said representations.

5.2.32 Unfortunately, the Centre did not highlight which representation I did not consider in my Notice. To highlight the information would have enabled me to assess if the said representations were relevant to the issues I presented in my Notice. All information received from the Centre which was material to the issues under my investigation were fully considered. It is important to note that there is information that appears in this report which was not presented to the Centre through the Notice due to the fact that there were no adverse findings made against the Centre on those issues.

Conclusion

5.2.33 I have considered the Centre’s submission and all the evidence at my disposal in respect of the allegations raised under this issue.

5.2.34 Bearing in mind that the objectives and the functions of the Centre as encapsulated in sections 3 of FICA is to assist in the identification of the proceeds of unlawful activities, the combating of money laundering and related activities, I am not persuaded that the vetting or non-vetting of officials in terms of section 12 of FICA, invalidates the work of the Centre or can be regarded as abuse of power.

5.2.35 During the processing of the reports received in terms of sections 28 and 29 of FICA, the Centre did not have to obtain warrants in accordance with section 26 of FICA. Instead, the Centre relied on section 32(2) of FICA to obtain any
additional information required to process the reports received in terms of the aforementioned sections.

5.2.36 I also found that non-compliance with sections 28 and 29 of FICA read with sub-regulations 24(3) and 24(4) of the FICA Regulations by an accountable institution, a reporting institution or any other person defined in section 29 of FICA does not preclude the Centre from processing the reports received in terms of aforesaid sections.

5.3 Whether the Centre’s referral to SARS was actioned in contravention of FICA and thus constituted maladministration.

Common cause issues

5.3.1 It is common cause that the Centre directed a referral dated 17 May 2016 to the erstwhile Commissioner.

5.3.2 The main issue for my determination is whether the Centre’s referral to SARS was done in contravention of FICA and thus constituted maladministration.

Issues in dispute

5.3.3 In his affidavit dated 6 April 2017 to my office, the Complainant deposed as follows:

3.3 “The referral of the FIC by the Director of the FIC to my employer, SARS in terms of section 40 of the FIC Act requesting that SARS initiate an investigation amount to a further abuse of power in that:
3.3.1 SARS is not the appropriate investigating authority to investigate the allegations outlined in the FIC report, and instead it should have referred to the Directorate for Priority Crimes Investigation (the DPCI) / Hawks, which would have been a neutral entity;

3.3.2 By virtue of SARS being my employer put the Commissioner of SARS in an invidious position of being faced with untested allegations in the FIC report requiring investigation to establish its veracity or otherwise which is then conveniently leaked“;

5.3.4 In the letter addressed to the erstwhile Commissioner, the Centre wrote as follows:

"The FIC received various cash threshold reports ("CTRs") and suspicious transaction reports ("STRs") concerning two employees of the South African Revenue Services ("SARS").

The report attached hereto is referred to SARS in terms of section 40 of the Financial Intelligence Centre Act 38 of 2001 for investigation to determine:

- Whether these individuals committed acts of tax evasion and other contravention of the Tax Administration Act 28 of 2011;
- Whether the funds received by these SARS employees constitutes payments of proceeds of crime arising from corrupt activities as defined in the Prevention and Combating of Corrupt Activities Act 12 of 2004 ("PRECCA");
- Whether employees of SARS effected payments in contravention of internal policies and/or the Public Finance Management Act 1 of 1999 "PFMA"); and
• Whether the aforementioned conduct of concealment and disguising of the true source of these funds constitute acts of money laundering as defined in section 1 of the Prevention of Organised Crime Act, 121 of 1998 (POCA)

5.3.5 The Complainant alleged that the Centre had not discharged its mandate to report the matter to the National Director of Public Prosecutions or refer it to the DPCI for investigation.

5.3.6 The Centre, in its submission to my office dated 29 June 2018, dismissed the Complainant’s argument that it abused its powers or exceeded its mandate by requesting SARS to investigate the matters referred to above. The Centre contended that SARS was one of the agencies to which the Centre is entitled to make information available.

5.3.7 In its responses dated 30 August 2019 and 12 September 2019 respectively, the DPCI reported that it received the STRs on 18 May 2016 and the matter is still under consideration.

5.3.8 According to the Centre, the fact that the Complainant and Ms Elskie were SARS employees at the time, is immaterial to any issues listed above as the Centre does not only refer matters to SARS where SARS employees are involved.

5.3.9 The Centre also rejected the Complainant’s allegations that it played “an overly active role in demanding feedback from the SARS Commissioner on the status of the investigation”. On the contrary, it was the erstwhile Commissioner who requested guidance from the Centre. The request for assistance in terms of the process that SARS needed to follow in conducting its investigation was made by the erstwhile Commissioner through a letter dated 21 July 2016.
5.3.10 In order to address this issue, reference was made to the regulatory framework discussed hereunder.

*Application of the relevant legal framework*

5.3.11 Section 3 of FICA states that:

(1) *The principal objective of the Centre is to assist in the identification of the proceeds of unlawful activities and the combating of money laundering activities and the financing of terrorist and related activities.*

(2) *The other objectives of the Centre are—*

(a) *to make information collected by it available to investigating authorities*, supervisory bodies, the intelligence services and the *South African Revenue Services to facilitate the administration and enforcement of the laws of the Republic.*

(b) *…*

5.3.12 Section 3(2) of FICA does not prohibit the referral to SARS on the grounds that the implicated parties are officials within SARS. On the contrary, the objective of the Centre includes facilitating the administration and enforcement of the laws of the Republic. The Centre's referral made reference to issues relating to the administration of the Tax Act, which responsibility fall under SARS in terms of section 3 of the Tax Act.

5.3.13 Section 4 of FICA provides that:

"To achieve its objectives the Centre must

(a) .."

---

5 Section 1 of FICA—"Investigating authority means any authority that in terms of national legislation may investigate unlawful activities"
(b) *Inform, advise and cooperate* with investigating authorities, supervisory bodies, the *South African Revenue Services* and the *Intelligence services*;

(c) *Monitor and give guidance to accountable institutions, supervisory bodies and other persons regarding the performance and compliance by them of their duties and obligations in terms of this Act or any directive in terms of this Act*;

(d) "..."

5.3.14 It is my considered view that although the Centre indicated that it did not actively request feedback pertaining to the SARS investigations as alleged by the Complainant, such a request would have been within the ambit of section 4(c) of FICA.

5.3.15 Section 40 of FICA states that:

(1) "No person is entitled to information held by the Centre, except-

(a) *An investigating authority* inside the Republic, the *South African Revenue Service* and the intelligence services, which may be provided with such information-

(i) *On the written authority if an authorised officer if the authorised officer believes such information is required to investigate suspected unlawful activity*; or

(ii) *At the initiative of the Centre, if the Centre reasonable believes such information is required to investigate suspected unlawful activity*;"

5.3.16 The above provisions mandates the Centre to make available information to SARS for the purposes of an investigation and/or enable SARS to execute its mandate in line with the empowering legislations. The Complainant's averments
that the Centre’s referral to SARS amounted to abuse of power and/or acted outside the scope of its mandate is contrary to the provisions cited above. Further thereto, the DPCI as one of the investigative authority referred to in sections 3, 4 and 40(1)(a) read with section 1 of FICA also confirmed receipt of the same report received by SARS.

**Conclusion**

5.3.17 In light of the information traversed above, the Centre's referral to SARS was consistent with of sections 3, 4 and 40 of the FICA and cannot be regarded as abuse of power by the Centre. Beyond that, the Centre also made its referral to the DPCI as an investigative authority defined in section 1 read with section 40 of FICA.

5.4 **Whether SARS abused its power when it sanctioned investigations against the Complainant by Hogan Lovells and the PWC.**

**Common cause issues**

5.4.1 It is common cause that the Complainant was employed as the Chief Operations Officer: Business and Individual Taxes at the commencement of SARS' investigations against him.

5.4.2 It is further common cause that the Centre's referral to SARS was directed to the attention of the erstwhile Commissioner through a letter dated 17 May 2016. Consequently, SARS sanctioned investigations against the Complainant and Elskie, one conducted by Hogan Lovells and another by the PWC.
5.4.3 The main issue for my determination is whether SARS abused its power when it sanctioned investigations against the Complainant conducted by Hogan Lowells and the PWC.

*Issues in dispute*

5.4.4 In a letter addressed to the erstwhile Commissioner, the Centre wrote:

"The FIC received various cash threshold reports ("CTRs") and suspicious transaction reports ("STRs") concerning two employees of the South African Revenue Services ("SARS").

The report attached hereto is referred to SARS in terms of section 40 of the Financial Intelligence Centre Act 38 of 2001 for investigation to determine:

- **Whether these individuals committed acts of tax evasion and other contravention of the Tax Administration Act 28 of 2011;**
- **Whether the funds received by these SARS employees constitutes payments of proceeds of crime arising from corrupt activities as defined in the Prevention and Combating of Corrupt Activities Act 12 of 2004 ("PRECCA");**
- **Whether employees of SARS effected payments in contravention of internal policies and/or the Public Finance Management Act 1 of 1999 "PFMA"); and**
- **Whether the aforementioned conduct of concealment and disguising of the true source of these funds constitute acts of money laundering as defined in section 1 of the Prevention of Organised Crime Act, 121 of 1998 (POCA).**
5.4.5 SARS, through a correspondence dated 12 July 2017, reported that, following receipt of the Centre’s referral, it commissioned Hogan Lovells to determine whether there had been contraventions by the Complainant in his capacity as an employee. In this regard, the investigation conducted by Hogan Lovells was essentially performed on behalf of SARS’ Human Resources in terms of SARS Disciplinary Code. Hogan Lovells’ mandate letter dated 29 September 2016 was signed by the erstwhile Commissioner on 4 October 2016.

5.4.6 In the aforementioned response to my office, Hogan Lovells also reported that a separate investigation to determine whether the Complainant had contravened the tax legislation was also undertaken by SARS as the receiver of revenue.

Disciplinary Investigation – Hogan Lovells

5.4.7 The Complainant’s submission was that the investigation of Hogan Lovells was tantamount to the abuse of power by SARS because it exceeded the limits of sections 6 and 10 of the Tax Act, which only allows the Commissioner to delegate such a task to a SARS official.

5.4.8 Notwithstanding the aforesaid, the Complainant, through letters addressed to SARS penned by his legal representative 6 dated 4 November 2016 and 23 January 2017 respectively, acknowledged and noted that Hogan Lovells was appointed as the investigating officer in terms of clause 8 of the SARS Disciplinary Code in order to determine whether the Complainant had committed any misconduct.

5.4.9 The Complainant conceded that SARS was within its rights to determine through a Hogan Lovells’ investigation if he had transgressed any of its policies as an employee of SARS, but could not investigate his tax affairs in terms of the Tax

---

6 Bakker and McKenzie Attorneys
Act. Although Hogan Lovells maintained that its investigation did not deal with the allegations of tax legislation contravention. In terms of its mandate letter, Hogan Lovells investigated "request C" which read thus:

"whether Mr Makwakwa and Ms Elskie effected payments in contravention of internal policies and/or the Public Finance Management Act, No 1 of 1999 ("the PFMA")."

5.4.10 In its submission dated 23 May 2018 to SCOF, Hogan Lovells contended that its "labour-related investigations in relation to Makwakwa were focussed on whether any of the suspicious, unusual or ad-hoc payments identified in the FIC Report were a breach by Makwakwa of SARS’ internal policies and/or the Public Finance Management Act—in other words, whether it amounted to misconduct in the employment context. Investigations into criminal conduct and tax invasion had to be made by the Hawks and SARS within their respective statutory and constitutional mandates and were not matters that Hogan Lovells could legally attend to”.

5.4.11 However, in paragraph 11.2 in its report dated 16 May 2016, Hogan Lovells refers to a review of the Centre's referral to SARS and in paragraph 11.4 reference is made to the analysis of the PWC’s report, which report, inter alia, contained information about the Complainant’s 76 banking transactions.

5.4.12 SARS submitted that the PWC’s first investigation was to determine the source of the Complainant’s income. This investigation was conducted on behalf of SARS in its capacity as an employer. This report was handed to Hogan Lovells to assist in determining whether or not the Complainant committed any misconduct.
5.4.13 It was the Complainant’s contention that SARS also contravened sections 67, 68 and 69 of the Tax Act by availing his bank statements and the Centre’ referral which contained his tax information to Hogan Lovells.

*Tax investigation-PWC*

5.4.14 The Complainant submitted that due to the fact that SARS was requested to investigate and determine whether he had contravened the Tax Act, the PRECCA, PFMA and/or POCA, SARS, however, had no requisite authority to investigate him as its employee for possible contravention of the said statues. Each of the said statues contained provisions pertaining to offences which could not be properly pursued by SARS.

5.4.15 In particular, the Tax Act applied to the Complainant as a tax payer and not as an employee of SARS. Therefore, an investigation of his tax affairs other than in terms of the Tax Act was unlawful. Further thereto, the Complainant was also accused of contravening the Tax Act in respect of the financial transactions which he was only obliged to declare to SARS, as a tax payer, by 26 November 2016.

5.4.16 Through a correspondence to my office dated 27 March 2019, SARS, submitted that it makes use of professionals in the normal course of its operations, including the appointment of attorneys and forensic investigators. It made reference to a meeting with my Investigation Team on 26 March 2019 wherein reference was made to the definition of a “SARS Official” contained in the Tax Act which included persons contracted by SARS.

5.4.17 In paragraph 5.8 of its letter to the Law Society of Northern Provinces dated 3 August 2018, Hogan Lovells stated that:
"...the investigations into alleged tax evasion were outsourced by SARS to Price Water Coopers ("PWC") because of a concern within SARS that the personnel who had to conduct the internal audit were all junior to Mr Makwakwa and accordingly were conflicted. We obtained senior counsel’s opinion on behalf of SARS and it was confirmed that SARS could outsource this function to PWC which it did."

5.4.18 It was not in dispute that the investigation conducted by the PWC related to the Complainant’s tax issues. In this regard, its mandate was to determine the following:

(a) Whether the Complainant and Ms Elskie effected payments in contravention of internal SARS policies and/or the PFMA;

(b) Whether the payments made to the Complainant by SARS other than his salary, which the Centre described as ‘ad hoc and irregular’ have resulted in SARS being defrauded and/or effected payments in contravention of internal polices and/or the PFMA; and

(c) Whether the Complainant and Ms Elskie have committed acts of tax evasion and other contraventions of the Tax Act.

5.4.19 In paragraph 3.1.1 of its report, the PWC indicated that its investigation included access to the Centre’s referral and its annexures. These documents included the Complainant’s financial information. In paragraph 3.2.1 of its report, the PWC also referred to the Complainant’s annual ITR12 and related ITA34 for 2010 until 2016 years of assessments.

5.4.20 SARS reported that in September 2014, it appointed a panel of service providers for the provision of Expert Advisory Services for forensic investigation, audit
advisory, financial risk management, valuations advice and debt management for a period of 36 months. The PWC was also part of the bidders who were approved to provide forensic investigation, audit advisory, financial risk management and debt management services.

5.4.21 In its submission dated 23 May 2018 to SCOF, Hogan Lovells submitted that “PWC forensics was appointed by Hogan Lovells to conduct a forensic investigations to make factual findings as to the identity of the source of funds in relation to payments identified as suspicious, unusual or ad hoc in the FIC report.”

5.4.22 In paragraph 1.1 of the PWC’s report dated 9 March 2017, the PWC confirmed that it was instructed by Hogan Lovells to investigate transactions identified in the Centre’s referral to SARS.

5.4.23 The issue of whether or not the initiation of the investigation against the Complainant by SARS through Hogan Lovells and the PWC constituted an abuse of power will be addressed by having due regard to the relevant legal framework discussed hereunder.

Application of the relevant legal framework

Hogan and Lovells

5.4.24 Clause 8 of the Collective Agreement on the Disciplinary Code and Procedure\(^7\) (Disciplinary Code) stipulates that:

8.1 "In matters such as fraud, corruption and in cases where an allegation is made that warrants an investigation, the Employer may appoint an investigating officer before taking disciplinary action..."

\(^7\) Signed on 26 April 2012
5.4.25 It was not disputed that Hogan Lovells was appointed as an investigating officer in terms of the Disciplinary Code. The issue raised against Hogan Lovells was that it accessed the Complainant’s tax information contrary to the provisions of the Tax Act.

5.4.26 Section 68(1) of the Tax Act states that:

(1) **SARS confidential information means information relevant to the administration of a tax Act that is—**
   (a) **Personal information about current or former official, whether deceased or not;**
   (b) ...;
   (c) **Information that was supplied in confidence by a third party to SARS the disclosure of which could reasonably be expected to prejudice the future supply of similar information, or information form the same source;**
   (d) ...”

(3) **A person who is a SARS official or former SARS official may disclose SARS confidential information if—**
   (a) **the information is public information;**
   (b) **authorised by the Commissioner;**
   (c) **disclosure is authorised under any other Act which expressly provides for the disclosure of the information despite the provisions in this Chapter;**
   (d) **access has been granted for the disclosure of the information in terms of the Promotion of Access to Information Act; or** (e) **required by order of a High Court**
5.4.27 In terms of section 69(1) "A person who is a current or former SARS official must preserve the secrecy of taxpayer information and may not disclose taxpayer information to a person who is not a SARS official. However, in terms of section 68(3)(b) of the Tax Act, the disclosure of the confidential information can be authorised by the Commissioner.

5.4.28 From the evidence presented, Hogan Lovells did not conduct an investigation into the Complainant’s tax issues. However, Hogan Lovells received information contained in the Centre’s referral, which information was supplied by the Centre to SARS in confidence. Hogan Lovells also accessed the analysis of the Complainant’s financial records through the first report of the PWC.

5.4.29 The PWC's first report was compiled on behalf of SARS as the employer in order to determine whether or not the Complainant had committed any misconduct. Therefore, the handing over of this report to Hogan Lovell was in line with the erstwhile Commissioner's obligation to maintain discipline in terms of Section 9(2) of the SARS Act.

5.4.30 The Complainant’s contention was that Hogan Lovells accessed this tax information contrary to the Tax Act. Firstly, Hogan Lovells accessed the Complainant's information through the Centre’s referral which was handed to it by SARS as an employer.

5.4.31 Secondly, Hogan Lovells accessed the Complainant’s information through PWC’s first report which emanated from the allegations contained in the Centre’s referral. This report was also handed to Hogan Lovells by PWC on behalf of SARS.

5.4.32 The aforementioned information contained the Complainant’s financial information and could otherwise be classified as the Complainant’s taxpayer information. In order to properly address the allegations against the Complainant,
Hogan Lovells, at the instance of SARS as the employer, accessed the Complainant’s financial information for the purposes of determining whether the Complainant had committed any misconduct.

5.4.33 Based on the information traversed above, SARS sought to maintain discipline amongst its employees in accordance with section 9(2) of the SARS Act when it sanctioned Hogan Lovells to deal with the allegations against the Complainant.

5.4.34 It is further evident that Hogan Lovells accessed to the Complainant financial information as a proxy of SARS and thus in a capacity as an employer. Alternatively, Hogan Lovells received the Complainant’s information, i.e. from the Centre’s referral, in accordance with section 68(3)(b) the Tax Act which allows a Commissioner to authorise a disclosure of confidential information at his disposal.

The PWC

5.4.35 Section 1 of the Tax Act provides that:

“SARS official” means—
(a) the Commissioner;
(b) an employee of SARS; or
(c) a person contracted or engaged by SARS, other than an external legal representative, for purposes of the administration of a tax Act and who carries out the provisions of a tax Act under the control, direction or supervision of the Commissioner”.

5.4.36 From the evidence submitted, it is apparent that the PWC was instructed to investigate the Complainant’s tax affairs in terms of the Tax Act. The PWC was contracted by SARS to carry out the provisions of the Tax Act under the control, direction or supervision of the Commissioner.
5.4.37 Section 6 of the Tax Act reads thus:

(1) "The powers and duties of SARS under this Act may be exercised for purposes of the administration of tax Act.

(2) Powers and duties which are assigned to the Commissioner by this Act must be exercised by the Commissioner personally but he or she may delegate such powers in accordance with section 10.

(3) The powers and duties required by this Act to be exercised by a senior SARS official must be exercised by

(a) The Commissioner;
(b) A SARS official who has a written authority from the Commissioner to do so; or
(c) A SARS official occupying a post designated by the Commissioner for this purpose.

(4) The execution of a task ancillary to a power or duty under subsection (2) or (3) may be done by-

(a) An official under the control of the Commissioner or a senior SARS official; or
(b) The incumbent of a specific post under the control of the Commissioner or a senior SARS official”.

5.4.38 Section 10 of the Tax Act read thus:

(1) "A delegation by the Commissioner under section 6 (2)—

(a) must be in writing;
(b) becomes effective only when signed by the person to whom the delegation is made;
(c) is subject to the limitations and conditions the Commissioner may determine in making the delegation;
(d) may either be to—
(i) a specific individual;
(ii) the incumbent of a specific post; and
(e) be amended or withdrawn by the Commissioner.

(2) A delegation does not divest the Commissioner of the responsibility for the exercise of the delegated power or the performance of the delegated duty”.

5.4.39 The above provisions empowers SARS to exercise certain powers and duties of the Commissioner which can also be delegated in writing to a specific individual or incumbent of a specific post in terms of section 10 of the Tax Act. However, in this case, the PWC did not derive its mandate to investigate the Complainant’s tax affairs under this provision.

5.4.40 SARS submitted that the PWC was appointed to provide, inter alia, forensic investigations services. In terms of the request for information (with reference number RFI02/2013), forensic investigation includes, but not limited to:

(a) “Tax investigation (Forensic), scoping of possible financial investigations/forensic as well as the assistance with the execution of financial investigations;
(b) Forensic investigative work (including electronic and hard copy document management in respect of information);
(c) Electronic data analysis;
(d) Preparation of tax computation which resulted from the forensic work;
(e) Provide tax advice; and
(f) To provide expert witness testimony and assist SARS in preparing for court procedures”.

5.4.41 SARS was requested, but unable to explain and/or provide documents evidencing that the PWC conducted its work as a SARS official in line with a
specific provision of the Tax Act. For instance, whether the PWC was acting under section 6(2) of the Tax Act; and if so, what constituted a written authority of the Commissioner, etc.

5.4.42 Moreover, in its submission to SCOF, Hogan Lovells also indicated that it instructed the PWC Forensics to delve into the Complainant’s financial transactions and issues of possible tax evasion. This position was also confirmed by the PWC.

5.4.43 Section 40 of Tax Act read thus:

"SARS may select a person for inspection, verification or audit on the basis of any consideration relevant for proper administration of a tax Act, including on a random or risk assessment basis."

5.4.44 The above section grants SARS a discretion to select a person for inspection, verification or audit. In this regard, it would appear that the basis for selecting the Complainant for tax audit was the Centre’s referral. Therefore, there would not have been an issue regarding the investigation of the Complainant in this regard. The only issue is whether the person conducting the said inspection, verification and audit has the necessary authority in terms of the Tax Act.

5.4.45 Section 41 of the Tax Act read thus:

(1) "A senior SARS official may grant a SARS official written authorisation to conduct a field audit or criminal investigation, as referred to in Part B.

(2) When a SARS official exercises a power or duty under a tax Act in person, the official must produce the authorisation.

(3) If the official does not produce the authorisation, a member of the public is entitled to assume that the official is not a SARS official so authorised."
5.4.46 The rationale provided for not utilising internal SARS official to conduct an audit against the Complainant was because of his seniority within the organisation. Described as “second in charge”, SARS considered it prudent to utilise the services of the PWC to conduct the audit or an investigation into the Complainant’s tax affairs.

5.4.47 Section 67 of the Tax Act provides that:

(1) "This Chapter applies to—
   (a) SARS confidential information as referred to in section 68 (1); and
   (b) taxpayer information, which means any information provided by a taxpayer or obtained by SARS in respect of the taxpayer, including biometric information.

(2) An oath or solemn declaration undertaking to comply with the requirements of this Chapter in the prescribed form, must be taken before a magistrate, justice of the peace or commissioner of oaths by—
   (a) a SARS official and the Tax Ombud, before commencing duties or exercising any powers under a tax Act; and
   (b) a person referred to in section 70 who performs any function referred to in that section, before the disclosure described in that section may be made.

(3) In the event of the disclosure of SARS confidential information or taxpayer information contrary to this Chapter, the person to whom it was so disclosed may not in a manner disclose, publish or make it known to any other person who is not a SARS official.

(4) A person who receives information under section 68, 69, 70 or 71, must preserve the secrecy of the information and may only disclose the information to another person if the disclosure is necessary to perform the functions specified in those sections.
(5) The Commissioner may, for purposes of protecting the integrity and reputation of SARS as an organisation and after giving the taxpayer at least 24 hours’ notice, disclose taxpayer information to the extent necessary to counter or rebut false allegations or information disclosed by the taxpayer, the taxpayer’s duly authorised representative or other person acting under the instructions of the taxpayer and published in the media or in any other manner.

5.4.48 It is evident that the PWC had conducted a tax investigation and accessed to the Complainant’s tax information during its investigation against him. This access was permissible because the appointment of the PWC rendered it a SARS official in accordance with the definition section of the Tax Act.

5.4.49 From the analysis of the above details, it is further evident that SARS embarked on two separate processes, one dealing with the Complainant as an employee of SARS and another dealing with him as the taxpayer.

Conclusion

5.4.50 In the circumstances, the appointment of Hogan Lovells was consistent with the Disciplinary Code in that it permits SARS to appoint an investigating officer to conduct disciplinary investigation. The Complainant also did not object to the appointment of Hogan Lovells to conduct the disciplinary investigation.

5.4.51 Hogan Lovells also accessed the Complainant’s financial information through a report of the PWC, outside the operation of the Tax Act. Hogan Lovells did not act as a SARS official as defined in the Tax Act, but instead acted as an employer in terms of section 9(2) of the SARS Act and was therefore entitled to access the Complainant’s information for the purposes of determining his liability in terms of SARS’ internal policies.
5.4.52 Secondly, the PWC was one of the companies that were in the panel of SARS to provide Expert Advisory Services. It is evident that the PWC conducted its investigation against the Complainant in relation to allegations of possible tax avoidance, which role it performed as a SARS official.

5.4.53 The PWC was contracted by SARS to carry out the provisions of the Tax Act under the control, direction or supervision of the Commissioner. The PWC was not commissioned in terms of section 6(2) read with 10 of the Tax Act.

5.5 SARS’s response to the Public Protector’s Notice dated 13 September 2019

At paragraphs 1.1-1.10 of the response

5.5.1 In its response, SARS contended that there is a clear distinction between "taxpayer information" and "SARS confidential information". It also submitted that the Complainant’s taxpayer information could only be used for the purpose of administration of a Tax Act, as described in section 3 read with section 6(1) of the Tax Act and the commissioning of an internal disciplinary investigation does not fall within the meaning of administration of a Tax Act.

5.5.2 SARS submitted that the PWC issued a report to Hogan Lovells on 9 and 17 March 2017 in relation to the investigation of the Complainant’s sources of income. In this regard, SARS was acting in its capacity as the Complainant’s employer. The Complainant was subsequently subjected to a disciplinary process for failure to, inter alia, comply with SARS' Declaration of Private Interest requirements.
5.5.3 SARS also submitted that the PWC issued a second report, as discussed below, which strictly dealt with the Complainant’s tax affairs. This report was handed directly to SARS and not to Hogan Lovells.

5.5.4 In its submission dated 25 October 2019, SARS advanced an argument that if it is assumed that the Centre’s referral should be viewed as constituting only taxpayer information, this occurred when SARS was seeking advice from Hogan Lovells on how to handle the allegations contained in the Centre’s referral. It can be deduced from the terms of reference between SARS and Hogan Lovells that the latter had to have first regard to the information contained in the Centre’s referral before determining how to proceed.

5.5.5 In view of the above context, I understood the erstwhile Commissioner’s rationale of providing Hogan Lovells with information received from the Centre. I am still of the view that the determination of whether or not disciplinary investigation was necessary dependent on the preliminary assessment of the allegations levelled against the Complainant. Alternatively, I am still of the view that the information from the Centre constituted confidential information as envisaged in section 68(1)(b) of the Tax Act, and such a disclosure to a third party could be authorised by the Commissioner in accordance with section 68(3) of the Tax Act.

5.5.6 I am satisfied that the Complainant’s information, financial or otherwise, was received by Hogan Lovells as a proxy of SARS as the employer and outside the operation of the Tax Act.

*At paragraphs 2.1 -2.7 of the response*

5.5.7 In its response SARS submitted that, in appropriate cases, it commissions other entities to conduct forensic services to provide support services. When SARS commissions a third-party, as it did in this instance, to perform work for SARS in
the course of the administration of the Tax Act, the provision of taxpayer information by SARS to the entity is covered by section 69(2)(a) of the Tax Act.

5.5.8 I am persuaded that the aforementioned provision empowers SARS to make a disclosure to a third party such as the PWC in the course of the administration of the Tax Act.

5.5.9 Moreover, during the meeting between SARS and myself on 11 October 2019, this matter was discussed at length. There was consensus that the PWC fell under the definition of a SARS official as defined in section 1 of the Tax Act. In this regard, the PWC was entitled to access the Complainant’s taxpayer information.

5.5.10 SARS submitted that although there are various instances wherein SARS may use the services of a third-party to assist in the administration of the Tax Act, it is not the practice to outsource the decision-making to a third party in a manner that the third party substitutes the SARS official. In fact, the second investigation report issued by the PWC into the Complainant’s tax affairs was directly handed to SARS.

5.5.11 In certain instances, the report from a third-party would enable SARS officials to execute the findings by issuing a letter of findings as contemplated in section 42 of the Tax Act, making an assessment, if appropriate, or laying criminal charges as contemplated in section 235(3) of the Tax Act.

5.5.12 In its further submission dated 25 October 2019, SARS confirmed that the PWC was briefed by Hogan Lovells on 27 October 2016 and its appointment was finalised on 2 November 2016. The PWC’s officials who were part of the
investigation also signed SARS Oath of Secrecy forms\(^8\) which \emph{inter alia} states that:

(b) "In carrying out the provision of any Act or portions thereof administered by the Commissioner for SARS under the SARS Act, 1997 (hereinafter referred to as the "Acts") or any other law in terms of which I have access to taxpayer information of SARS confidential information, as defined in section 1 of the Tax Administration Act or information relating to any person, firm or business as contemplated in section 4(3) of the Customs and Excise Act (hereafter referred to as "trader information") will-

(i) preserve the secrecy of taxpayer information and not disclose taxpayer information to a person who is not a SARS official; and

(ii) not disclose SARS confidential information to a person who is not a SARS official, or to a SARS who is not authorised to have access to the information,

(iii) ...

5.5.13 SARS also entered into a Services Agreement\(^9\) concluded between SARS and the PWC on 10 October 2014. Clause 17.1 of the Service Agreement read thus:

"For the purpose of this Agreement, the Key Personnel shall be deemed to be SARS Officials as contemplated in the Tax Administration Act, 2011 (Act No.28 of 2011)".

5.5.14 SARS submitted that the appointment of the PWC to assist in the administration of the Tax Act, did not involve the delegation of powers in terms of section 10 of the Tax Act, but instead the engagement of services as mentioned in the definition of a SARS official.

\(^8\) This was also a requirement in terms of clause 17.4 of the Services Agreement (see footnote 11 below).

\(^9\) Services Agreement in respect of the provisions of Expert Advisory Services RFI 02/2013 (Services Agreement)
5.5.15 SARS submitted that the PWC conducted a tax analysis which was recorded in the PWC's report dated 9 March 2017. The extent of information received by PWC from SARS in respect of the Complainant's tax affairs was recorded in the letter dated 5 December 2016 from Mr Mark Kingon to one Louis Strydom of the PWC.

5.5.16 On or about 5 June 2017, Mr Kingon shared the PWC's tax related report with the erstwhile Commissioner. The latter requested Mr Kingon to recommend SARS tax auditor to look into the Complainant's tax affairs. Mr Solly Parak and Mr Martin Malebo (both employees of SARS) were appointed as auditors to take data collected by the PWC and conduct an end-to-end tax audit thereof.

5.5.17 The evidence traversed above clearly shows that the PWC accessed the Complainant's tax information as a SARS official. The PWC's officials who dealt with the Complainant's tax information signed the oath of secrecy to provide an additional layer of protection to the taxpayer's information.

5.5.18 According to the evidence at my disposal, the PWC was involved in gathering the necessary data to enable SARS, in the form of the two appointed SARS officials to conduct an end-to-end tax audit into the Complainant's tax affairs.

5.5.19 The Complainant's argument was that any tax investigation by a person or an entity other than SARS was in violation of the Tax Act.

5.5.20 I am persuaded that the accessing of the Complainant's tax information by the PWC during its investigation was not inconsistent with the definition of SARS official as envisaged in section 1 of the Tax Act.
5.5.21 For all intense and purpose, the PWC was acting as a SARS official and therefore it did not access the Complainant’s tax information in contravention of sections 67, 68 and/or 69 of the Tax Act. Similarly, SARS’s disclosure of the Complainant’s tax information to the PWC was not in contravention of the aforementioned provisions.

5.6 Whether SARS and/or the erstwhile Commissioner improperly disclosed the Centre’s confidential information to the Complainant and improperly failed to respond to a request for information by the Complainant.

Common cause issues

5.6.1 It is common cause that upon receipt of the Centre’s referral, the erstwhile Commissioner requested the Complainant to respond to the allegations contained in the said referral.

5.6.2 It is also common cause that the disciplinary hearing against the Complainant in relation to the Centre’s referral returned a not guilty verdict against him.

5.6.3 The main issue for my determination is whether the erstwhile Commissioner improperly disclosed the Centre’s confidential information to the Complainant and also failed to respond to a request for information by the Complainant

Issues in dispute

5.6.4 The erstwhile Commissioner wrote a letter to the Complainant dated 20 May 2016 which read:
“Herewith find attached for your kind and urgent attention the said FIC
documents that are classified as extremely confidential containing serious
allegations around you.

I received this [sic] documents on the 18 May 2016 late afternoon and I had no
time to familiarise myself of the contents thereof. Last night I had the
opportunity to break the seal and I thought I needed to share the serious
allegations they purport around you”.

5.6.5 The Complainant’s legal representative through a letter to the erstwhile
Commissioner dated 30 May 2016 stated, inter alia, that the allegations made by
the Centre were baseless and without foundation.

5.6.6 In a letter from the Complainant’s legal representative to the erstwhile
Commissioner dated 10 August 2016, paragraph 3 reads:

“Our clients are in the process of preparing a response to an investigation
instituted by your office in respect of allegations contained in the report
compiled by the Financial Intelligence Centre (FIC)”

5.6.7 In the aforementioned letter, the erstwhile Commissioner was requested to first
respond, inter alia, to the following:

“whether the FIC’s personnel seized of this matter have the requisite security
screening certificate(s) as required in terms of the provisions of section 12 of
FICA? If the answer to this enquiry is affirmative, our client’s hereby request
copies of such certificate(s);

whether a representative(s) of the FIC, who examined and ostensibly made
extracts from or copies of records kept by the banks referred to in the
unmarked annexures to the letter under reply, were obtained under a warrant properly issued in chambers by either a magistrate or a regional magistrate or a judge, as provided for in terms of section 26(1) and (2) of FICA? Equally, if the answer to this enquiry is affirmative, our clients hereby request copies of such warrant(s), please provide the requisite supporting documents;

the Reports filed in terms of section 28 and 29 of FICA

details as to when did the enquiry into the affairs of our clients commence

full particulars relating to each suspicious transaction involving our clients...."

5.6.8 The Complainant's legal representative wrote another letter dated 22 August 2016 to the erstwhile Commissioner indicating that the information requested was still required in order for her clients to respond within the timeframe of 31 August 2016. The response from the erstwhile Commissioner on 22 August 2016 was that he was still liaising with the Centre regarding the request.

5.6.9 Through a letter dated 22 August 2016, the erstwhile Commissioner redirected the requested information and/or documentation made by the Complainant and Ms Elskie's legal representatives to the Centre. On 31 August 2016, the erstwhile Commissioner informed the Complainant's legal representative that he had not received any response from the Centre and duly extended the timelines initially given to the Complainant.

5.6.10 The erstwhile Commissioner wrote to the Centre on 7 September 2016 requesting the Centre to provide "feedback with regard to the request for information and/or documentation that was lodged by Ms Elskie and Mr Makwakwa through their legal representatives".
5.6.11 The erstwhile Commissioner wrote to the Centre on 13 September 2016 expressing disappointment at a lack of a response to his letters dated 22 August and 7 September 2016 by the Centre.

5.6.12 In its letter inadvertently dated the 19th instead of the 13th of September 2016 addressed to the erstwhile Commissioner, the erstwhile Director of Centre wrote:

"It is clear to me from the content of your letter dated 22 August 2016, in particular the details of the information from Mr Makwakwa’s and Ms Elskie legal representatives, that the referral made to your office in terms of section 40 of the Financial Intelligence Centre Act, 2001 (Act 38 of 2001, the FIC Act) was made available to the subjects of the referral, Mr Makwakwa and Ms Elskie, or at the very least brought to their attention, subsequent to being handed over to your office.

The Financial Intelligence Centre (FIC) has been providing SARS with financial intelligence since 2003. SARS employees are well aware of the access, handing and terms and conditions of the use of such sensitive information. I must point out that the conduct mentioned above constitutes a serious criminal offence under section 60 of the FIC Act.

The process followed by SARS in this matter as appears inconsistent with the investigative practice and tradecraft. It is the FIC’s experience that SARS does not give affected tax payers copies of the informer information when people blow the whistle on an errant taxpayer—a practice that would amount to tipping off the taxpayer as to the possibility of a pending investigation against him or her. If such conduct was normal practice it would undermine the whistle-blower mechanism and result in the collapse of whistle-blowing as a source of information to enforce tax-collection."
Against this background it should be clear that the legal representatives of Mr. Makwakwa and Ms Elskie are not entitled to receive any of the information they had requested and providing them with any such information would exacerbate the contraventions of the FIC Act which have already occurred.

Section 40(1)(c) of the FIC Act, quoted in your letter of 22 August 2019 as the basis for the legal representatives’ request, does not in any manner create an entitlement for the subject of a referral to request information about the referral whatsoever.

5.6.13 In his response dated 15 September 2016 to the aforesaid letter, the erstwhile Commissioner wrote:

“Upon receipt of your Report (Report) dated 17 May 2016, I instituted a misconduct investigation into allegations of impropriety, tax evasion, corruption, contravention of Public Finance Management Act 1 of 1999 (‘PFMA’) and money laundering against two SARS’ employees, namely Mr. Mashudu Jonas Makwakwa and Ms. Kelly-Ann Elskie. In instituting the misconduct investigation against the said employees, I was executing my responsibility to maintain discipline in terms of Section 9(2) of the SARS Act 34 of 1994 (‘SARS Act’), as the Chief Executive Officer for SARS. Furthermore, as an Accounting Authority for SARS, I am responsible to ensure the proper and diligent implementation of the PFMA. I am particularly obligated by Section 84 of the PFMA to investigate allegations of financial misconduct.

In disclosing the Report to the aforesaid employees, I acted within the confines of the law as contemplated in section 41(a) of FICA. The disclosure of the Report was conducted within the scope of my powers and duties in terms of the aforementioned provisions of the SARS Act and the PFMA.
My decision to release the Report to the aforementioned employees does not amount to misuse of information as contemplated in section 60 of FICA. It is glaring that section 60(1) of does not attach any criminal liability to the information disclosed in accordance with section 41(a) of FICA. As a result, your allegation with regard to act of criminality under section 60 of FICA is unfounded, at best constitutes alarming levels of legal incompetence, and at worst it constitutes a superfluous act of intimidation on the person of the Commissioner for SARS.

5.6.14 In his letter dated 19 September 2016 to SARS, the erstwhile Director of the Centre wrote:

"It is apparent from the letter and correspondence which preceded it that our respective offices hold different views regarding the interpretation of the Financial Intelligence Centre Act 38 of 2001 (FICA) and the manner in which South African Revenue Services (SARS) dealt with the referral of 17 May 2016.

Moreover, for the reasons set out in my letter dated 13 September 2019, I remain of the view that the approach adopted by your office in dealing with this matter and more particularly the manner in which your office handled the information contained in the Centre’s report, is in contravention of FICA and its objectives”.

5.6.15 In his response to the Notice dated 28 September 2019, the erstwhile Commissioner submitted that in availing the Centre’s referral to the Complainant, he took cognisance of the negative reputational damage that could follow SARS, if the allegations as reflected are true, considering the seniority of the Complainant within SARS. He also submitted that "there were no malafides"
when he handed the Centre’s referral to the Complainant. He did so to enable the Complainant to appreciate the veracity of the allegations he was facing and to comply with the *audi alteram partem* rule.

5.6.16 During an interview with the erstwhile Commissioner on 11 February 2020, he also argued that as the Accounting Officer it would have been imprudent of him to conduct an investigation against the Complainant without his knowledge.

5.6.17 As reiterated during the aforesaid meeting and as per his response to the Notice, the erstwhile Commissioner submitted that:

> "It is important to highlight the fact that, upon receipt of these serious allegations on [sic] the 17 May 2016 against the member of Exco, I urgently requested an urgent meeting with the erstwhile Director of FIC to help me understand measures I needed to put in place since this was a daunting and shocking revelations

My request to meet and discuss with the erstwhile Director was not favourably accepted, I honestly sough his expert advice given the sensitivities around the investigation referral". On an unspecified date I drove to the FIC offices to “solicit” assistance through a verbal engagement, most unfortunately this short meeting did not bear any positive fruits. This uncooperative stance left me disappointed considering the common endeavour we sought to achieve in our respective mandates”.

5.6.18 In spite of not receiving the requested information from SARS, the Complainant subsequently provided SARS with response to allegations contained in the Centre’s referral on 4 November 2016.
5.6.19 It is evident from the engagement between SARS and the Centre that there was disagreement regarding whether or not the erstwhile Commissioner should have given the Centre's referral to the Complainant. In this regard, this raised a question whether the erstwhile Commissioner disclosed the Centre's referral to the Complainant in contravention of the provisions of FICA.

5.6.20 The issues raised herein will be addressed by having regard to the regulatory framework below.

*Application of the relevant legal framework*

5.6.21 As already discussed above, SARS received a referral from the Centre in accordance with section 40 of FICA.

5.6.22 Section 41 of FICA states that:

> "No person may disclose confidential information held by or obtained from the Centre except-

(a) within the scope of that person's power and duties in terms of any legislation;

(b) for the purpose of carrying out the provisions of this Act;

(c) within the permission of the Centre"

5.6.23 It is evident from the engagement between SARS and the Centre that the latter had not granted permission that the confidential information contained in its referral could not be disclosed to the Complainant in terms of section 41(c) of FICA. However, section 41(a) of FICA permits disclosure when a person is acting within the scope of his or her powers and duties, which he was in this instance. It was the erstwhile Commissioner's submission that the disclosure of the Centre's
referral to the Complainant was prompted by other legislative prerogatives applicable to him as the Accounting Officer at the time.

5.6.24 Section 9(2) of the South African Revenue Service Act, 34 of 1997 (SARS Act) reads:

(2) "As chief executive officer the Commissioner is responsible in particular for—
(a) the formation and development of an efficient administration;
(b) the organisation and control of the staff,
(c) the maintenance of discipline; and
(d) the effective deployment and utilisation of staff to achieve maximum operational results".

5.6.25 Section 9(2)(c) of the SARS Act places an obligation on the Commissioner to maintain discipline. The erstwhile Commissioner's contention was that the Centre's referral was furnished to the Complainant pursuant to the disciplinary process which is founded on the principle of audi alteram partem.

5.6.26 The Centre's referral contained information that required verification through an investigation by SARS. It was also Hogan Lovells' observation at paragraph 6 of its report that the Centre's referral did not come to any definitive conclusions on whether the Complainant or Ms Elskie had committed any offence. It was the Centre's argument that the referral was essentially inconsistent with investigative practice.

5.6.27 The Centre also remarked that SARS would not give affected taxpayers copies of informer's information when people whistle blow on an errant taxpayer as this would amount to "tipping-off" an errant taxpayer. Therefore, if such conduct was normal practice, it would undermine the whistle-blower mechanism.
5.6.28 It was against this background that the Centre was of the view that the erstwhile Commissioner’s conduct was inconsistent with section 41(a) of FICA in handing over the referral to the Complainant. Further thereto, the Centre refused to accede to SARS’ request for information for the purpose of passing it on to the Complainant or the subjects of its referral, as this would have further exacerbate the contravention of FICA.

5.6.29 In terms of section 33(1) of the Constitution every person whose rights or (legitimate expectation) are affected or threatened is entitled to a procedurally lawful, reasonable and fair administrative action.

5.6.30 Section 188 of the LRA provides that, to be fair, a dismissal that is not automatically unfair must be for a fair reason and in accordance with a fair procedure. Therefore any process that may result in the dismissal of an employee must be fair.

5.6.31 Schedule 8 of the LRA provides for fair procedure which state that:

(1) “Normally, the employer should conduct an investigation to determine whether there are grounds for dismissal. This does not need to be a formal enquiry. The employer should notify the employee of the allegations using a form and language that the employee can reasonably understand. The employee should be allowed the opportunity to state a case in response to the allegations. The employee should be entitled to a reasonable time to prepare the response and to the assistance of a trade union representative or fellow employee. After the enquiry, the employer should communicate the decision taken, and preferably furnish the employee with written notification of that decision”.
5.6.32 In *Chirwa v Transnet Ltd & Others* (2008) 29 ILJ 73 (CC) the Constitutional Court also confirmed that the LRA is premised on the principle of natural justice:

"[42] The LRA includes the principles of natural justice. The dual fairness requirement is one example; a dismissal needs to be substantively and procedurally fair. By doing so, the LRA guarantees that an employee will be protected by the rules of natural justice and that the procedural fairness requirements will satisfy the audi alteram partem principle and the rule against bias. If the process does not, the employee will be able to challenge her or his dismissal, and will be able to do so under the provisions and structures of the LRA. Similarly, an employee is protected from arbitrary and irrational decisions, through substantive fairness requirements and a right not to be subjected to unfair labour practices."

5.6.33 At the very least, a fair process will entail informing an employee of the allegations levelled against them in order to afford them a right of reply thereto.

5.6.34 On the issue of the disclosure of the Centre’s referral to the Complainant, I have considered both arguments from the Centre and SARS. Whereas disclosure of confidential Information from the Centre is permissible, it can only occur within the confines of section 41 of FICA. In the main, the erstwhile Commissioner argued that he was permitted to disclose the information from the Centre whilst executing his duties in terms of section 9(2) of the SARS Act and section 84 of the PFMA.

5.6.35 The argument advanced by the erstwhile Commissioner was that the referral contained such serious allegations against one of the senior member of SARS warrant a swift action, thus the decision to immediately accord the Complainant an opportunity to respond thereon. The handover of the referral to the Complainant was done pursuant to the erstwhile Commissioner’s obligations in terms of the SARS Act and in line with the principles of natural justice.
5.6.36 I am therefore persuaded that although it was not necessary to disclose the referral in its original form, the election to do so was *bona fide* and motivated by the desire to properly deal with the matter.

5.6.37 However, the unintended consequences was that in order exercise his right of reply, the Complainant was seized with questions about the referral which he wanted SARS and/or the Centre to also address. The nature of the question could only be addressed by the Centre and not SARS. The disclosure of the information requested by the Complainant via SARS would have been in contravention of FICA.

5.6.38 On the basis of the above, I am of the view that the disclosure of the referral to the Complainant was proper in that the erstwhile Commissioner acted within the ambit of section 41(a) of FICA, section 9(2)(c) of the SARS Act, the *audi alteram partem* rule, the LRA and the Constitution.

5.6.39 It could not have been the intention of the Centre to correspond with the Complainant regarding its referral to SARS, otherwise the Centre would have availed the requested information.

5.6.40 It is also against this backdrop that one can understand why the Complainant’s request for information from SARS was not forthcoming. However, on the evidence traversed above, there was continuous engagement between the erstwhile Commissioner and the Complainant’s legal representative regarding the Complainant’s request for information.

5.6.41 However, I do not agree with the erstwhile Commissioner’s attempt to rely or reference to Section 84 of the PFMA in this matter. The section provides that:

“*A charge of financial misconduct against an accounting officer or official referred to in section 81 or 83, or an accounting authority or a member of an*
accounting authority or an official referred to in section 82, must be investigated, heard and disposed of in terms of the statutory or other conditions of appointment or employment applicable to that accounting officer or authority, or member or official, and any regulations prescribed by the Minister in terms of section 85".

5.6.42 Furthermore, the erstwhile Commissioner appeared to argue that the Centre’s referral raised allegations of financial misconduct that had to be investigated in terms of section 84 of the PFMA. It should be noted that the investigation in terms of the aforementioned section could only have been permissible where the financial misconduct or transactions alluded to in the Centre’s referral were concluded by the Complainant in his capacity as a SARS’ official.

5.6.43 The Complainant would have had to be an official as espoused in section 81(2) of the PFMA and was performing a delegated function or had received an instruction in terms of section 44(1) of the PFMA.

**Conclusion**

5.6.44 In light of the information traversed above, the erstwhile Commissioner did not fail to provide the requested information and/or documents to the Complainant in that SARS did not have the said information nor would it have been permissible in terms of section 41 of FICA to hand it over to the Complainant. The Centre was only obligated to provide information to SARS pursuant to its own investigation in terms of section 41(a) of FICA.

5.6.45 Secondly, the disclosure of the Centre’s referral to the Complainant by the erstwhile Commissioner was consistent with section 41(a) of FICA read with section 9(2)(c) of the SARS Act, the *audi alteram partem* rule, the LRA and the Constitution.
5.7 Whether Ms T A Tlholonyane abused her power as an employee of SARS to either conduct an investigation into the Complainant’s financial affairs or caused such investigation to be conducted by the Centre.

Common cause issues

5.7.1 It is common cause that Ms TA Tlholonyane is an employee of SARS employed as Manager BAIT: Criminal Case Selection.

5.7.2 Ms Tlholonyane was married to the Complainant and their divorce was finalised on 13 October 2016.

5.7.3 The main issue for my determination is whether Ms Tlhlonynane abused her power as an employee of SARS to either conduct an investigation into the Complainant’s financial affairs or caused such investigation to be conducted by the Centre.

Issues in dispute

5.7.4 The Complainant submitted that in the affidavit deposed on 13 August 2015 during the divorce case number 44933/2015, Ms Tlholonyane quoted several deposits that were made into his bank account. This was despite the fact that Ms Tlhlonynane had no access to his bank accounts and thus the only way she could have accessed his accounts was through the Centre and/or by abusing her power as a SARS’ official.

5.7.5 SARS confirmed that in December 2017, the Fraud and Investigation Unit (now called Anti-Corruption Unit) received a complaint from the Complainant, through his legal representatives, that Ms Tlhlonynane may have abused her power to
access his financial information. The complaint was approved for investigation on 15 December 2017.

5.7.6 In light of the complaint from the Complainant, the issues investigated by the Anti-Corruption Unit were as follows:

(a) “That Ms Tholonyane accessed Mr Makwakwa and Ms Elskie’s tax information and released it to a 3rd party.

(b) “That Ms Tholonyane function at work included constant liaison with the FIC and might have abused this to settle a personal vendetta with him and his [sic] fiancé [at the time]”.

5.7.7 SARS reported that Ms Tholonyane was investigated for possible breaches of the SARS Acceptable Use Policy.

5.7.8 During a meeting with SARS and my Investigation Team and through correspondence dated 27 March 2019, SARS submitted that the investigation conducted by SARS could not find any merits to the complaint based on the following:

(a) “An eyeballing report, which electronically records every SARS official who access a taxpayer’s records, was extracted and there was no record of Ms Tholonyane accessing the tax profiles of Mr Makwakwa and Ms Elskie.

(b) The analysis of the electronic equipment yielded no basis for further investigation as no communication or sharing of Mr Makwakwa and Ms Elskie’s information with the FIC and/or 3rd party was detected.

(c) The Investigation was finalised and closed as unfounded on 05 July 2018”.

73
5.7.9 Further thereto, SARS submitted that in accordance with the operational arrangement between SARS and the Centre, Ms Tholonyane was not one of the authorised SARS personnel to liaise with the Centre at the time.

5.7.10 During the interview on 24 June 2019, Ms Tholonyane denied having used her position in SARS to access the Complainant’s financial records. She also reiterated that although she worked in the unit that would request financial information of individuals who were selected for an audit from the Centre, she was not responsible for approving such requests. During the period in question, she never signed any document requesting the Complainant’s financial information from the Centre.

5.7.11 On the issue pertaining to the Complainant’s bank records which were used during divorce proceedings, she contended that the information was obtained during the time when they (Ms Tholonyane and the Complainant) were applying for their daughter’s study loan.

5.7.12 Ms Tholonyane further submitted that more bank records of the Complainant were subpoenaed directly from the bank by her legal representative during the divorce proceedings. A copy of subpoena directed to the First National Bank (FNB) dated 22 August 2016 was presented to my Investigation Team.

5.7.13 In its response dated 29 June 2019, the Centre categorically stated that it did not receive a request for the Complainant’s financial information or a complaint from Ms Tholonyane.

*Application of the relevant legal framework*

5.7.14 Section 2.2 (a) of the Information Security Acceptable Usage provides that:
"SARS Users will be held accountable for all activities and transactions performed using their user IDs and must not share their user IDs or passwords including pin codes".

5.7.15 The above cited provision places a responsibility on each user to be accountable for all activities performed using their user IDs.

5.7.16 Based on the copy of Ms Tlhlononyane’s affidavit cited above, it is evident that she had accessed the Complainant’s financial information. However, there was no evidence unearthed or submitted to this investigation indicating that Ms Tlhlononyane had abused her power as a SARS’ official or inappropriately used her user ID to access the Complainant’s financial information.

Conclusion

5.7.17 In view of the above, there was no sufficient evidence to conclude that Ms Tlhlononyane abused her power as an employee of SARS to either conduct an investigation into the Complainant’s financial affairs and/or caused such investigation to be conducted by the Centre.

5.8 Whether the Centre and/or SARS improperly disclosed the Centre’s referral to the media

Common cause issues

5.8.1 It is common cause that there were several media articles that were published by different media houses regarding the Complainant’s financial affairs.

5.8.2 The main issue for my determination is whether the Centre and/or SARS had improperly disclosed the Centre’s referral to SARS to the media
Issues in dispute

5.8.3 The Complainant submitted that during September 2016 and October 2016, several reports were published in the media and on digital media platforms relating to his alleged misconduct as the former Chief Operations Officer: Business and Individual Taxes for SARS, and that of his wife, Elskie, also a SARS employee.

5.8.4 The Complainant contended that it was evident from the reading of the articles that the authors or the journalists who wrote these articles had access to the Centre’s referral to SARS.

5.8.5 These were some of the articles that were published on the issue:

5.8.5.1 An article published on 11 September 2016 in the Sunday Times newspaper titled “Revenue Services No. 2 Probed for R1.2 million in suspicious cash deposits, by Susan Comrie, Sam Cole and Craig McKune;

5.8.5.2 An article on 11 September 2016 on the Mail and Guardian website titled “SARS Chief’s Mystery Stash” by Susan Comrie, Sam Cole and Craig McKune;

5.8.5.3 An article on 13 September 2016 on the Mail and Guardian website titled “Why will the Hawks not investigate SARS second-in-command?” by Ranjeni Munusamy; and

5.8.5.4 An article on 15 September 2016 on the Mail and Guardian website titled “SARS Second in Command Jonas Makwakwa suspended over mystery payments of R1.2m” by Pauli van Wyk.
5.8.6 SARS, through a correspondence dated 12 July 2017, refuted the allegations that it released information relating to the referral of the Centre to the media. SARS further submitted that insofar as such information may have been released, it was not within the knowledge and/or authorisation of SARS.

5.8.7 Further thereto, SARS reported that it invited the Complainant to submit any and all information that he may have in respect of a SARS' employee(s) he had reason to believe may have been involved in the unauthorised disclosure of the Centre's referral to the media, but failed to so.

5.8.8 The Centre, through correspondence dated 28 June 2018 to my office, also refuted the allegations that it released information relating to the Centre's referral to SARS to the media. The Centre submitted that the referral to SARS was hand delivered for the attention of the erstwhile Commissioner.

5.8.9 Mr Rayman Lalla (Mr Lalla) submitted, through a sworn affidavit\(^\text{10}\), that he joined SARS in 2011 as a senior manager and was assigned at the Justice and Crime Prevention and Security (JCPS) Cluster, the Anti-Corruption Task Team (ACTT), and extending therefrom, to interact inter alia with the Centre. His delegation to represent SARS at the Financial Action Task Force (FATF) and the Eastern and Southern African Anti-Money Laundering Group (ESAAMLG) was confirmed by the erstwhile Commissioner in May 2015 and August 2015 respectively.

5.8.10 Mr Lalla collected the referral from Mr Nischal Mewalall of the Centre on 17 May 2017 during a meeting requested by the Centre and as per the direction of the erstwhile Director. At the time was requested to hand deliver a confidential document, contained in a sealed envelope to the erstwhile Commissioner.

\(^{10}\) Dated 5 February 2020
5.8.11 He personally hand delivered a confidential document to the Executive Secretary, Ms Thembani Mokhari, for her to place it in the erstwhile Commissioner's safe. Copy of acknowledgement receipt of the referral by Ms Mokhari was furnished to the Public Protector by SARS in this regard. The sealed envelope was retrieved from the safe by Ms Mokhari who delivered it to a meeting Mr Lalla held with the erstwhile Commissioner on the morning of 18 May 2016. Mr Lalla then conveyed the message from the Centre that the contents of the envelope were of a highly confidential nature as it related to the possible corruption involving SARS officials.

5.8.12 In an email correspondence dated 18 May 2016 from Mr Lalla to one Minee Hendricks, Mr Lalla confirmed that on 17 May 2016, he personally hand delivered a confidential document to Ms Mokhari, for her to place it in the erstwhile Commissioner's safe.

5.8.13 In a note attached to Mr Lalla's email referred to above, Ms Mokhari advised the erstwhile Commissioner that Mr Lalla did not take the document, after she had acknowledged it, but asked that it be put in a safe Mr Lalla told her that he will come first thing in the morning and hand deliver the document to the erstwhile Commissioner. Mr Lalla duly hand delivered the document to the erstwhile Commissioner the following morning.

5.8.14 During a meeting held with my Investigation Team and the then Acting Commissioner of SARS, Mr Mark Kingon, and his team, on 26 March 2019, he indicated that Mr Lalla received the Centre's referral in his capacity as a liaison between SARS and the Centre.

5.8.15 The Complainant submitted that Mr Lalla was also working with his ex-wife (Ms T A Tholonyane) at the time and therefore may have divulged the contents of the Centre's referral to her. However, during an interview on 24 June 2019, Ms
Tiholonyane submitted that she did not work directly with Mr Lalla nor did she have close interactions with him.

5.8.16 It was the Complainant’s contention that Mr Lalla hijacked the matter for political gains and shared the information with external parties, including some at the Luthuli House. However, he did not present any concrete evidence in this regard.

5.8.17 During a meeting with SARS on 26 March 2019, SARS reported that it did not conduct any investigation into the alleged disclosure. SARS submitted that it would have been particularly difficult to conduct such investigation given the fact that the alleged leak could have emanated from either the Centre or SARS and that it would not have had the mandate to question the Centre regarding the alleged disclosure. However, during a meeting with the erstwhile Commissioner on 11 February 2020, he indicated that SSA conducted a probe into the alleged leak but found that the leak did not occur at SARS.

5.8.18 During the investigation, it was established that the erstwhile Commissioner wrote a letter to the Complainant dated 20 May 2016 which read:

“Herewith find attached for your kind and urgent attention the said FIC documents that are classified as extremely confidential containing serious allegations around you.

I received this documents on the 18 May 2016 late afternoon and I had no time to familiarise myself of the contents thereof. Last night I had the opportunity to break the seal and I thought I needed to share the serious allegations they purport around you”. [sic]
5.8.19 The Complainant’s legal representative through a letter to the erstwhile Commissioner dated 30 May 2016 stated, *inter alia*, that the allegations made by the Centre were baseless and without foundation.

5.8.20 Premised on the above, it was noted that the Complainant and his legal representative were also in possession of the Centre’s referral to SARS in May 2016 before the publication of the above-mentioned articles.

5.8.21 There was no further evidence received during this investigation indicating that there was impermissible disclosure of the Centre’s referral to SARS by any official of the Centre and/or SARS.

*Application of the relevant legal framework*

5.8.22 Section 40 of the FICA enlist the institutions that can receive information from the Centre and circumstances under which the information under the Centre could be made available individuals. In this regard, the media is not included as one of the institutions entitled to receive information from the Centre.

5.8.23 As already alluded to above, section 41 of the FICA provides for circumstances wherein a disclosure of confidential information held by or obtained from the Centre is permissible. In this case, the grounds which would have warranted the disclosure of the Centre’s referral to the media did not exist.

5.8.24 Furthermore, section 68(3) of the Tax Act read thus:

(3) “A person who is a SARS official or former SARS official may disclose SARS confidential information if—

(a) the information is public information;

(b) authorised by the Commissioner;
(c) disclosure is authorised under any other Act which expressly provides for the disclosure of the information despite the provisions in this Chapter;

(d) access has been granted for the disclosure of the information in terms of the Promotion of Access to Information Act; or

(e) required by order of a High Court"

5.8.25 Section 68(1)(c) of the Tax Act\textsuperscript{11} prohibits the disclosure of confidential information, this would include information received from the Centre, to a person who is not a SARS official or to a SARS official who is not authorised to access the said information. However, section 68(3)(b) of the Tax Act permits the Commissioner to authorise the disclosure of confidential information.

5.8.26 In this case, there was no evidence showing that the erstwhile Commissioner had authorised the disclosure of the confidential information contained in the Centre’s referral to the media. There was also no evidence showing that the said confidential information was disclosed to the media on any other grounds mentioned in section 68(3) of the Tax Act.

5.8.27 It terms of the above provisions, it would have been impermissible for anyone to have disclosed the confidential information contained in the Centre’s referral to SARS except in compliance with section 41 of the FICA or section 68 of the Tax Act. However, it could not be determined by this investigation if the Centre or its officials and/or SARS or its officials were involved in disclosing the information to the media.

\textsuperscript{11} Section 68(1) of the Tax Act reads:

(1) "SARS confidential information means information relevant to the administration of a tax Act that is—
(c) information that was supplied in confidence by a third party to SARS the disclosure of which could reasonably be expected to prejudice the future supply of similar information, or information from the same source."
Conclusion

5.8.28 In the circumstances, I could not find evidence implicating the Centre or its officials and/or SARS or its officials in the disclosure of the Centre’s referral to SARS to the media.

5.9 Whether the Complainant was improperly prejudiced by the conduct of the Centre and/or SARS

Common cause issues

5.9.1 The Complainant was subjected to a disciplinary hearing, which hearing absolved him of any misconduct.

Issues in dispute

5.9.2 The issue for my determination was whether the Complainant was improperly prejudiced by the conduct of the Centre and/or SARS.

5.9.3 The Complainant submitted that he suffered personal torture and humiliation which also caused him health problems.

5.9.4 His rights as an employee of SARS and as a taxpayer were violated in that correct procedures were not followed. Following the receipt of the Centre’s referral which contained serious allegations against the Complainant, it would have been amiss of SARS not to take any measures to address the allegations contained therein. In this regard, the two investigations undertaken against the Complainant cannot be regarded as improper or that it amounted to abuse of power by SARS and/or the erstwhile Commissioner.
5.9.5 The Complainant contended that illegal publication of his financial transactions by media caused damage to his integrity. The reports were grossly exaggerated to create an impression that he was a corrupt official. As already alluded to in the discussion under paragraph 5.8 above, the disclosure of the Centre’s referral was impermissible and consequently prejudicial to the Complainant as it was inconsistent with the provisions of FICA and of the Tax Act. However, our mandate could not be extended into the investigation of the Sunday Times newspaper and other media houses as requested by the Complainant.

Applicable legislative framework

5.9.6 In terms of section 69(1) of the Tax Act, “A person who is a current or former SARS official must preserve the secrecy of taxpayer information and may not disclose taxpayer information to a person who is not a SARS official”.

5.9.7 In this case, the Complainant’s tax and financial information was divulged to the media in contravention of the provisions of both FICA and the Tax Act as discussed above. The disclosure has ostensibly resulted in the reputational damage to the Complainant’s character and other personal prejudices.

Conclusion

5.9.8 In the circumstances, the Complainant suffered improper prejudice primarily as a result of the improper disclosure of his financial information to the media. However, there was insufficient evidence to impute the improper prejudice to either the Centre or its officials and/or SARS or its officials.
6 FINDINGS AND OBSERVATIONS

Having considered the evidence uncovered during the investigation against the relevant regulatory framework, I hereby make the following findings:

6.1 Regarding whether the Centre improperly launched an investigation against the Complainant in contravention of the provisions FICA.

6.1.1 The allegation that the Centre improperly launched an investigation against the Complainant in contravention of the FICA, is unsubstantiated.

6.1.2 Seventy five (75) cash deposits totalling R785 130.00 were deposited into the Complainant’s personal bank account between 1 March 2010 and 31 January 2016. Of the 75 cash deposits, forty eight (48) amounting to R726 400.00 were deposited between 2014 and 2015. The Centre conceded that it only received the reports relating to the Complainant’s financial affairs in 2016 and not within the time periods prescribed in the FICA Regulations.

6.1.3 Notwithstanding the above, I found that non-compliance with sections 28 and 29 of FICA read with sub-regulations 24(3) and 24(4) of the FICA Regulations by accountable institution, a reporting institution or any other person defined in section 29 of FICA does not preclude the Centre from processing the reports received in terms of aforesaid sections.

6.1.4 Bearing in mind that the objectives and the functions of the Centre as encapsulated in sections 3 of FICA is to assist in the identification of the proceeds of unlawful activities, the combating of money laundering and related activities, I am not persuaded that the vetting or non-vetting of the officials invalidates the work of the Centre or can be regarded as abuse of power.
6.1.5 I also found that during the processing of the reports received in accordance with sections 28 and 29 of FICA, the Centre did not have to obtain warrants in terms of section 26 of FICA. Instead, the Centre relied on section 32(2) of FICA to obtain any additional information required to process the reports received in terms of the aforementioned sections.

6.1.6 Therefore, the conduct of the Centre does not constitute improper conduct in terms of section 182(1)(a) of the Constitution and maladministration as envisaged in section 6(4)(a)(i) of the Public Protector Act.

6.2 Regarding whether the Centre’s referral to SARS was actioned in contravention of FICA and thus constituted maladministration.

6.2.1 The allegation allegations that the Centre’s referral to SARS was actioned in contravention of the FICA and thus constitute maladministration, is unsubstantiated;

6.2.2 The Centre’s referral to SARS was also consistent with section 40 of FICA which identifies SARS as one of the institution that can receive confidential information from the Centre.

6.2.3 I could not find any provision in FICA that prohibits a referral to SARS on the grounds that the implicated parties are officials within SARS.

6.2.4 The Centre’s referral to SARS was also consistent with the objectives and functions of the Centre as espoused in section 3 and 4 of FICA which includes availing and informing SARS about the information it has collected, which information can assist "to facilitate the administration and enforcement of the laws of the Republic"; and
6.2.5 Therefore, the conduct of Centre does not constitutes improper conduct in terms of section 182(1)(a) of the Constitution and maladministration or abuse of power as envisaged in section 6(4)(a)(i)& (ii) of the Public Protector Act.

6.3 **Regarding whether SARS abused its power when it sanctioned investigations against the Complainant by Hogan Lovells and the PWC.**

6.3.1 Firstly, the allegation that SARS abused its power when it sanctioned investigations against the Complainant by Hogan Lowells is unsubstantiated;

6.3.2 Hogan Lovells was commissioned by SARS through section 8 of the Disciplinary Code to investigate whether the Complainant *breached the SARS’ internal policies and/or the Public Finance Management Act* in other words, whether his conduct amounted to misconduct in the employment context. Hogan Lovells did not conduct an investigation into the Complainant’s tax issues;

6.3.3 Hogan Lovells also accessed the Complainant’s financial information through the Centre’s referral and the first report of PWC;

6.3.4 The Complainant’s information, financial or otherwise, was received by Hogan Lovells as a proxy of SARS as the employer and outside the operation of the Tax Act;

6.3.5 Therefore, SARS did not abuse its powers when it sanctioned Hogan Lovells to conduct a disciplinary investigation against the Complainant; and

6.3.6 In this regard, the conduct of SARS does not constitute improper conduct in terms of section 182(1)(a) of the Constitution and abuse of power or unjustifiable exercise of power as envisaged in section 6(4)(a)(ii) of the Public Protector Act.
6.3.7 Secondly, the allegation that SARS abused its power when it sanctioned investigations against the Complainant by the PWC is unsubstantiated;

6.3.8 The PWC was duly appointed by SARS in 2014 to serve on SARS’ Expert Advisory Services Panel under RFI No. 02/2013 to provide, *inter alia*, expert advisory services for forensic investigations, audit advisory and financial risk management;

6.3.9 The PWC was instructed by SARS through Hogan Lovells on 2 November 2016 to investigate the Complainant’s tax affairs in terms of the Tax Act. The PWC’s officials seized with the investigation also signed the Oath of Secrecy on 7 November 2016 in order to safeguard the Complainant’s information;

6.3.10 The PWC accessed the Complainant’s tax information as a SARS official as defined in section 1 of the Tax Act. In this regard, the PWC was acting as a SARS official and therefore it did not access the Complainant’s tax information in contravention of sections 67, 68 and/or 69 of the Tax Act. Equally, SARS’s disclosure of the Complainant’s tax information to the PWC was not in contravention of the aforementioned provisions;

6.3.11 SARS appointed Mr Solly Parak and Mr Martin Lalebo to conduct the Complainant’s tax audit in terms of the Tax Act after the issuing of the second report by the PWC on matters relating to the Complainant’s tax affairs for the period between 2010 and 2016; and

6.3.12 In this regard, the conduct of SARS constitute improper conduct in terms of section 182(1)(a) of the Constitution and unjustifiable exercise of power as envisaged in section 6(4)(a)(ii) of the Public Protector Act.
6.4 Regarding whether SARS and/or the erstwhile Commissioner improperly disclosed the Centre’s confidential information to the Complainant and improperly failed to respond to a request for information by the Complainant.

6.4.1 Firstly, the allegation that the erstwhile Commissioner improperly failed to respond to request for information by the Complainant is unsubstantiated;

6.4.2 There was regular communication between the erstwhile Commissioner and the Complainant’s legal representatives regarding the requested for information;

6.4.3 SARS was not in a position to provide the information requested by the Complainant due to the fact that the information related to work done by the Centre during the processing of STRs and CTRs linked to the Complainant; and

6.4.4 In view of the forgoing, I could not find any maladministration and/or improper conduct on the part of SARS and/or the erstwhile Commissioner in this regard.

6.4.5 Secondly, the allegation whether the erstwhile Commissioner improperly disclosed the Centre’s confidential information to the Complainant is unsubstantiated;

6.4.6 The handing over of the Centre’s referral to the Complainant by the erstwhile Commissioner was consistent with section 41(a) of FICA read with section 9(2)(c) of the SARS Act, the audi alteram partem rule, the LRA and the Constitution; and

6.4.7 Therefore, the conduct of the erstwhile Commissioner does not constitute improper conduct in terms of section 182(1)(a) of the Constitution and maladministration as envisaged in section 6(4)(a)(i) of the Public Protector Act.
6.5 Regarding whether Ms T A Thololonyane abused her power as an employee of SARS to either conduct an investigation into the Complainant's financial affairs or caused such investigation to be conducted by the Centre

6.5.1 The allegation that Ms T A Thololonyane abused her power as an employee of SARS to either conduct an investigation into the Complainant's financial affairs or caused such investigation to be conducted by the Centre, is unsubstantiated;

6.5.2 I could not find evidence that Ms T A Thololonyane abused her power as an employee of SARS to either conduct an investigation into the Complainant's financial affairs or caused such investigation to be conducted by the Centre;

6.5.3 I also found that SARS investigated the same allegations against Ms T A Thololonyane but could not find any evidence that she abused her position as SARS official to either conduct an investigation into the Complainant's financial affairs or caused such investigation to be conducted by the Centre; and

6.5.4 Therefore, I could not determine if Ms Thololonyane's conduct constitutes improper conduct in terms of section 182(1)(a) of the Constitution and unjustifiable exercise of power as envisaged in section 6(4)(a)(ii) of the Public Protector Act.

6.6 Regarding whether the Centre and/or SARS improperly disclosed the Centre’s referral to the media.

6.6.1 The allegation that that Centre and/or SARS improperly disclosed the Centre's referral to SARS to the media could not be substantiated.

6.6.2 The evidence at my disposal could not implicate the Centre and/or its officials and/or SARS and/or its officials in relation to the disclosure that was made to the media.
6.7 Regarding whether the Complainant was improperly prejudiced by the conduct of the Centre and/or SARS

6.7.1 The allegation that the Complainant was improperly prejudiced by the conduct of the Centre and/or SARS, is unsubstantiated;

6.7.2 I was unable to find evidence that the Centre and/or its officials and/or SARS and/or its officials were responsible for the disclosure of the Complainant's financial information to the media;

6.7.3 Notwithstanding the aforesaid, I am inclined to believe that the Complainant suffered improper prejudice in the form of a personal and professional reputational damage, primarily as a result of the improper disclosure of his financial information to the media; and

6.7.4 However, I was unable to determine if the improper prejudice as envisaged in section 6(4)(a)(v) of the Public Protector Act could be attributed to the Centre or its officials and/or SARS or its officials.

6.8 OBSERVATIONS

6.8.1 I have noted that in order to address some of the challenges that were experienced during the processing of the Centre's referral, the two entities signed a memorandum of understanding (MoU) on 15 March 2019.
6.8.2 It terms of aforesaid MoU, its purpose will *inter alia*:

"...regulates, strengthens and formalises matters of mutual co-operation, collaboration, assistance and exchange of information between the Parties, in the fulfilment of their concomitant legislative responsibilities and obligations as prescribed by the FIC Act, the SARS Act or any other legislature."

6.8.3 I further noted that the MoU, *inter alia*, provides for the guidelines on mutual co-operation and collaboration, guidelines for the exchange of information, confidentiality and permissible use of information.

6.8.4 I am therefore satisfied that sufficient measures have since been taken to address how the two entities should handle confidential information from both sides in the future.

7 REASONS FOR CLOSURE

7.1 The reasons for closure is on the basis that the issues investigated were unsubstantiated.

ADV. BUSISWE MKHWEBANE
PUBLIC PROTECTOR OF THE
REPUBLIC OF SOUTH AFRICA
DATE: 05/03/2020