

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



**PUBLIC PROTECTOR
SOUTH AFRICA**

Report number: 40 of 2021/2022

ISBN NO: 978-1-77634-708-7

**REPORT ON AN INVESTIGATION INTO ALLEGATIONS OF UNDUE DELAY AND/OR
IMPROPER CONDUCT BY THE IRBA TO FINALISE AN INVESTIGATION INTO A
COMPLAINT LODGED BY MR KENNETH NKOSANA MAKATE**

TABLE OF CONTENTS

EXECUTIVE SUMMARY	3
1. INTRODUCTION	8
2. THE COMPLAINT	9
3. POWERS AND JURISDICTION OF THE PUBLIC PROTECTOR	10
4. THE INVESTIGATION	14
5. THE DETERMINATION OF ISSUES IN RELATION TO THE EVIDENCE OBTAINED AND CONCLUSIONS MADE WITH REGARD TO THE APPLICABLE LAW AND PRESCRIPTS	19
6. FINDINGS	48
7. REMEDIAL ACTION	49
8. MONITORING	50

Executive Summary

- (i) This is a report issued in terms of section 182(1)(b) of the Constitution of the Republic of South Africa, 1996 (the Constitution), and section 8(1) of the Public Protector Act, 1994.
- (ii) The report communicates the findings and the remedial action taken in terms of section 182(1)(c) of the Constitution, following an investigation into allegations of undue delay and/or improper conduct by the Independent Regulatory Board for Auditors (IRBA) to finalise an investigation into a complaint lodged by Mr Kenneth Nkosana Makate (the Complainant).
- (iii) On 28 January 2020, Mr Kenneth Nkosana Makate (the Complainant) lodged a complaint with my office, making the following allegations:-
 - a. That on 16 April 2018, the Complainant lodged a complaint with the IRBA in the form of a sworn statement as prescribed in terms of Rule 2.2 of the Disciplinary Rules of the IRBA, requesting the IRBA to investigate the liability disclosure of Vodacom (Pty) Ltd with regard to the “Please Call Me” matter.
 - b. In his complaint to the IRBA, the Complainant requested that the following issues be investigated by the IRBA:
 - aa) *“Possible misstatement in the audited annual financial statements of Vodacom per section B of the attached affidavit, relating to the extent of liabilities disclosed;*
 - bb) *Concealment of possible criminality to the detriment of shareholders including government of RSA, and other stakeholders such as investors, pension funds per section E of the attached affidavit;*

-
- cc) *The treatment of an existing liability as contingent liability. There was no litigation against Vodacom after the Constitutional Court's order and all that was supposed to be determined was quantification of an amount owed to Makate, this matter is reflected in correspondence among the parties and is in line with the Constitutional Court's order. The analysis that informed this disclosure and accounting treatment of "Please Call me" as contingent liability must be investigated;*
- dd) *Misleading statements contained in Vodacom's Pre-listing statement (prospectus), as articulated in section D of the attached affidavit. The auditors of Vodacom as per the Pre-listing statement were Deloitte; and*
- ee) *Any other matters that the Board or the IRBA deems necessary to investigate at its own discretion".*
- c. The Complainant further alleged that since lodging his complaint with the IRBA, the IRBA has failed to provide him with regular feedback on his complaint and further, that the IRBA did not provide him with specific timeframes upon which his complaint would be finalised.
- (iv) On analysis of the complaint, the following issue was identified and investigated:
- (a) Whether there was an undue delay by the IRBA to investigate and finalise the investigation into a complaint lodged by Mr Makate, and if yes, whether such conduct constitutes maladministration?
- (v) The investigation process was conducted in terms of section 182(1) of the Constitution and sections 6 and 7 of the Public Protector Act and included the analysis of the documents and information obtained from the Complainant, meeting, written

communication with relevant officials of the IRBA, as well as the application of all relevant laws and related prescripts.

(vi) Having considered the evidence uncovered during the investigation against the relevant regulatory framework, the following findings are made: -

(a) Regarding whether there was an undue delay by the IRBA to investigate and finalise an investigation into a complaint lodged by Mr Makate, and if so, whether such conduct constitutes maladministration:-

(aa) The allegation that there was an undue delay by the IRBA to finalise an investigation into a complaint lodged by Mr Makate, is substantiated.

(bb) It is however acknowledged that the investigation - from the time the matter was allocated to a Senior Investigator for investigation - was conducted and finalised within a reasonable period. In that the plan was approved or confirmed by the Board during April 2020 and the investigation was concluded on 14 January 2021 i.e. nine (9) months. However, the IRBA failed to allocate the file to an investigator within a reasonable time. The file was only allocated to the investigator after more than 22 months, i.e. close to two (2) years, after it was received from the Complainant. Such a long delay is considered to be unreasonable, and constitutes maladministration.

(cc) The IRBA lacks adequate internal processes and service standards in which investigation timelines are prescribed and it further failed to implement proper processes to ensure speedy resolution of complaints.

(dd) The IRBA failed to provide the Complainant with regular feedback on his complaint and it only provided feedback when the Complainant enquired about the progress of the investigation, or when negative media/social media communications were made.

-
- (ee) The IRBA's system of allocating files annually to the investigators is found to be another contributing factor causing undue delay in finalising investigation files.
 - (ff) The conduct of the IRBA is in violation of the Constitution and thus constitutes improper conduct as envisaged in Section 182(1) of the Constitution and maladministration as envisaged in Section 6(4)(i) & (ii) of the Public Protector Act.
 - (gg) The appropriate remedial action taken in terms of section 182(1)(c) of the Constitution, are the following:

The Minister of Finance (the Minister):

- (aa) The Minister to take cognisance of the envisaged remedial action; and

The Chairperson of the IRBA Board:

- (bb) The Chairperson of the IRBA Board to take cognisance of the envisaged remedial action.

The Acting Chief Executive Officer, Mr Imre Nagy, of the IRBA must:

- (cc) Within ninety (90) working days from the date of this final report, develop a Standard Operating Procedure Manual (SOP) and Service Standards to enhance the IRBA Rules when conducting investigations, with prescribed timelines within which investigations should be conducted; to ensure continuous communication with Complainants and to ensure speedy resolution and turn-around times of complaints.
- (dd) Ensure that all the investigating staff are trained on the newly developed Standard Operating Procedure Manual and Service Standards within thirty (30) working days after it was developed.

(ee) Review the current process of allocation of investigation files to ensure that all investigation files are allocated and attended to without delay and finalised within the prescribed SOP timelines.

REPORT ON AN INVESTIGATION INTO ALLEGATIONS OF UNDUE DELAY AND/OR IMPROPER CONDUCT BY THE IRBA TO FINALISE AN INVESTIGATION INTO A COMPLAINT LODGED BY MR KENNETH NKOSANA MAKATE

1. INTRODUCTION

- 1.1. This is a report in terms of section 182(1)(b) of the Constitution of the Republic of South Africa, 1996 (the Constitution) and section 8(1) of the Public Protector Act, 1994 (the Public Protector Act).
- 1.2. This report is submitted, in terms of section 8(3) of the Public Protector Act, to the following people to note the outcome of this investigation:-
- 1.2.1 The Minister of Finance, Minister Enoch Godongwana;
- 1.2.2 The Chairperson of the IRBA Board, Mr Fulvio Tonelli;
- 1.2.3 The Acting Chief Executive Officer, Mr Imre Nagy.
- 1.3. A copy of the report is also provided to Mr Kenneth Nkosana Makate, the Complainant, to inform him about the outcome of this investigation.
- 1.4. A notice was issued in terms of section 7(9) of the Public Protector Act to the then Minister of Finance, Mr Tito Mboweni, and to Mr Imre Nagy, the Acting Chief Executive Officer of the IRBA, on 18 June 2021 affording them an opportunity to respond to the evidence obtained during the investigation and the intended findings. A response to the notice was received from the IRBA on 01 July 2021.

2. THE COMPLAINT

2.1 On 28 January 2020, Mr Kenneth Nkosana Makate (the Complainant) lodged a complaint with my office, making the following allegations:-

2.1.1 That on 16 April 2018, he lodged a complaint with the IRBA in the form of a sworn statement as prescribed in terms of Rule 2.2 of the Disciplinary Rules of the IRBA requesting it to conduct an investigation into the liability disclosure of Vodacom (Pty) Ltd with regard to the “Please Call Me” matter.

2.1.2 In his complaint, the Complainant requested that the following issues be investigated by the IRBA:

2.1.2.1 *“Possible misstatement in the audited annual financial statements of Vodacom per section B of the attached affidavit, relating to the extent of liabilities disclosed;*

2.1.2.2 *Concealment of possible criminality to the detriment of shareholders including government of RSA, and other stakeholders such as investors, pension funds per section E of the attached affidavit;*

2.1.2.3 *The treatment of an existing liability as contingent liability. There was no litigation against Vodacom after the Constitutional Court’s order and all that was supposed to be determined was quantification of an amount owed to Makate, this matter is reflected in correspondence among the parties and is in line with the Constitutional Court’s order. The analysis that informed this disclosure and accounting treatment of “Please Call me” as contingent liability must be investigated;*

2.1.2.4 *Misleading statements contained in Vodacom's Pre-listing statement (prospectus), as articulated in section D of the attached affidavit. The auditors of Vodacom as per the Pre-listing statement were Deloitte; and*

2.1.2.5 *Any other matters that the Board or the IRBA deems necessary to investigate at its own discretion".*

2.1.3 The Complainant further alleged that since lodging the complaint with the IRBA, the IRBA had failed to provide him with regular feedback or progress on his complaint and further, that the IRBA did not provide him with specific timeframes by when his complaint would be finalised.

3. POWERS AND JURISDICTION OF THE PUBLIC PROTECTOR

3.1 The Public Protector is an independent constitutional body established under section 181(1)(a) of the Constitution of the Republic of South Africa, 1996 (the Constitution) to strengthen constitutional democracy through investigating and redressing improper conduct in state affairs.

3.2 Section 182(1) of the Constitution provides that:

"The Public Protector has the power 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 Section 6(4) of the Public Protector Act mandates the Public Protector to investigate any alleged maladministration in connection with the affairs of government at any level undue delay by any person performing a public function.
- 3.5 The Public Protector is further mandated by the Public Protector Act, 1994 (the Public Protector Act) to investigate and redress maladministration and related improprieties in the conduct of state affairs.
- 3.6 The Public Protector is also given the power to resolve disputes through conciliation, mediation, negotiation or any other appropriate alternative dispute resolution mechanisms.
- 3.7 In the *Economic Freedom Fighters v Speaker of the National Assembly and Others; Democratic Alliance v Speaker of the National Assembly and Others*¹ the Constitutional Court per Chief Justice Mogoeng stated the following when confirming the powers of the Public Protector:
- 3.7.1 Complaints are lodged with the Public Protector to cure incidents of impropriety, prejudice, unlawful enrichment or corruption in government circles;²
- 3.7.2 An appropriate remedy must mean an effective remedy, for without effective remedies for breach, the values underlying and the rights entrenched in the Constitution cannot properly be upheld or enhanced;³

¹ CCT 143/15; CCT171/15 [2016] ZACC 11, 2016 (5) BCLR 618 (CC); 2016 (3) SA 580 (CC); 31 March 2016.

² Para [65].

³ Para [67].

-
- 3.7.3 Taking appropriate remedial action is much more significant than making a mere endeavor to address complaints which was the most I could do in terms of the Interim Constitution. However sensitive, embarrassing and far – reaching the implications of her report and findings, I am constitutionally empowered to take action that has that effect, if it is the best attempt at curing the root cause of the complaint;⁴
- 3.7.4 The legal effect of these remedial measures may simply be that those to whom they are directed are to consider them properly, with due regard to their nature, context and language, to determine what course to follow;⁵
- 3.7.5 Every complaint requires a practical or effective remedy that is in sync with its own peculiarities and merits. It is the nature of the issue under investigation, the findings made and the particular kind of remedial action taken, based on the demands of the time, that would determine the legal effect it has on the person, body or institution it is addressed to;⁶
- 3.7.6 The Public Protector’s power to take appropriate remedial action is wide but certainly not unfettered. What remedial action to take in a particular case, will be informed by the subject-matter of the investigation and the type of findings made;⁷
- 3.7.7 Implicit in the words “take action” is that the Public Protector is empowered to decide on and determine the appropriate remedial measure. And “action” presupposes, obviously where appropriate, concrete or meaningful steps.

⁴ Para [68].

⁵ Para [69].

⁶ Para [70].

⁷ Para [71].

Nothing in these words suggests that the Public Protector necessarily has to leave the exercise of the power to take remedial action to other institutions or that it is power that is by its nature of no consequence;⁸

3.7.8 The Public Protector has the power to determine the appropriate remedy and prescribe the manner of its implementation;⁹

3.7.9 “Appropriate” means nothing less than effective, suitable, proper or fitting to redress or undo the prejudice, impropriety, unlawful enrichment or corruption, in a particular case.¹⁰

3.7.10 The remedial action taken by the Public Protector has a binding effect.¹¹ The Constitutional Court further held that: *“When remedial action is binding, compliance is not optional, whatever reservations the affected party might have about its fairness, appropriateness or lawfulness. For this reason, the remedial action taken against those under investigation cannot be ignored without any legal consequences”*.¹²

3.8 The IRBA is a statutory body established in terms of the Auditing Profession Act No. 26 of 2005, who performs a public function by controlling that part of the accountancy profession involved in public accountancy in South Africa, and as such the matter falls within the Public Protector’s mandate to investigate.

3.9 The Public Protector’s power and jurisdiction to investigate and take appropriate remedial action was not disputed by the IRBA.

⁸ Para [71(a)].

⁹ Para [71(d)].

¹⁰ Para [71(e)].

¹¹ Para [76].

¹² Para [73].

4. THE INVESTIGATION

4.1. Methodology

4.1.1. The investigation was conducted in terms of section 182 of the Constitution, which gives the Public Protector the power to investigate alleged or suspected improper or prejudicial conduct in state affairs, to report on that conduct and to take appropriate remedial action. Section 6(4) of the Public Protector Act further regulates the manner in which the power conferred by section 182 of the Constitution may be exercised in respect of government at any level.

4.1.2. A formal investigation was conducted through meetings and interviews with the Complainant and the IRBA, correspondence between the Public Protector and the IRBA, as well as an inspection and perusal of all relevant documents, correspondence and the analysis and application of relevant laws, policies and related prescripts.

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:

- a) What happened?
- b) What should have happened?
- c) Is there a discrepancy between what happened and what should have happened and does that deviation amounts to maladministration?

d) 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 had the undue delay and/or maladministration not taken place?

- 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 whether there was an undue delay by the IRBA and whether such conduct caused prejudice to the Complainant as envisaged in section 6(4)(a)(v) of the Public Protector Act.
- 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 IRBA or an organ of state to prevent maladministration.
- 4.2.4. The enquiry regarding the remedy or remedial action seeks to explore options for redressing the consequences of maladministration. Where a Complainant has suffered prejudice, the idea is to place him or her as close as possible to where he or she would have been had the IRBA or organ of state complied with the regulatory framework setting the applicable standards for good administration.
- 4.2.5. A notice in terms of section 7(9) of the Public Protector Act was issued to the then Minister of Finance, Mr Tito Mboweni and to Mr Imre Nagy, the Acting Chief Executive Officer of the IRBA, on 18 June 2021 affording them an opportunity to respond to the evidence obtained during the investigation and the intended findings.

4.2.6. An acknowledgement of receipt of the notice was received from the office of the Minister on 21 June 2021 and a response to the notice was received from the IRBA on 01 July 2021.

4.3. On analysis of the complaint, the following issue was considered and investigated:

4.3.1 Whether there was an undue delay by the IRBA to investigate and finalise an investigation into a complaint lodged by Mr Makate, and if yes, whether such conduct constitutes maladministration.

4.4. The Key Sources of Information

4.4.1. Documentation:-

4.4.1.1. Complaint form date stamped 28 January 2020;

4.4.1.2. Copy of email correspondence within the IRBA dated 18 April 2018;

4.4.1.3. An acknowledgement letter from the IRBA to the Complainant dated 23 May 2018;

4.4.1.4. A copy of an article by Destiny Man Magazine dated 25 May 2018;

4.4.1.5. Copy of a letter from the IRBA to the Complainant dated 28 May 2018;

4.4.1.6. An email correspondence from the Complainant to the IRBA dated 07 June 2018;

4.4.1.7. An email correspondence from the IRBA to the Complainant dated 02 August 2018;

-
- 4.4.1.8. Copy of the IRBA Investigations Department Committee Meetings for 2020/2021;
 - 4.4.1.9. Copy of the IRBA investigations process;
 - 4.4.1.10. Copy of the work plan of the Senior Investigator allocated the matter of the Complainant;
 - 4.4.1.11. An email correspondence from the IRBA to the Complainant dated, 26 February 2019;
 - 4.4.1.12. Copy of the Complainant's tweet dated, 18 November 2018;
 - 4.4.1.13. Maverick article titled "Unaccountable" dated, 09 November 2020;
 - 4.4.1.14. Copy of the inspectors' report dated, 7 January 2021;
 - 4.4.1.15. Copies of the minutes books dated, 9 December 2020 & 14 January 2021;
 - 4.4.1.16. Analysis of the IRBA workload;
 - 4.4.1.17. A copy of the IRBA investigation outcome to the Complainant dated, 15 January 2021;
 - 4.4.1.18. Copy of the IRBA Strategic Plan for 2021 – 2025; and
 - 4.4.1.19. Copy of the IRBA Annual Performance Plan for 2021 – 2022.

4.4.2. Correspondence Sent and Received

- 4.4.2.1. Letter from PPSA to the IRBA, dated 22 July 2020 informing the IRBA of the investigation;

-
- 4.4.2.2. Letter from the IRBA to PPSA dated, 05 August 2020;
 - 4.4.2.3. Follow-up letter from the PPSA to the IRBA, dated 02 September 2020;
 - 4.4.2.4. Response from the IRBA to the PPSA, dated 22 September 2020;
 - 4.4.2.5. Email correspondence from the PPSA to the IRBA dated, 02 October 2020;
 - 4.4.2.6. Email correspondence from the IRBA to the PPSA dated, 02 October 2020;
 - 4.4.2.7. Email correspondence from the Complainant to PPSA dated, 20 October 2020;
 - 4.4.2.8. Follow up letter from the PPSA to the IRBA dated, 19 January 2021;
 - 4.4.2.9. Response from the IRBA to the PPSA dated, 25 January 2021;
 - 4.4.2.10. Email correspondence from the Complainant dated, 1 February 2021;
 - 4.4.2.11. Notice in terms of section 7(9)(a) dated 18 June 2021;
 - 4.4.2.12. Letter from the IRBA to the PPSA dated, 21 June 2021; and
 - 4.4.2.13. Letter from the IRBA to PPSA dated 01 July 2021.

4.4.3 Meetings held:-

- 4.4.3.1 Meeting between PPSA and the IRBA on 11 February 2021.

4.4.4 Legislation and other prescripts:-

- 4.4.4.1 The Constitution of the Republic of South Africa, 1996 (the Constitution);
- 4.4.4.2 Public Protector Act, 23 of 1994 (Public Protector Act);

-
- 4.4.4.3 The Auditing Profession Act, 26 of 2005 (the Auditing Profession Act);
 - 4.4.4.4 Repeal of the Disciplinary Rules made under the Public Accountants' and Auditors Act, 80 of 1991; and
 - 4.4.4.5 Promotion of Administrative Justice Act 3 of 2000 (PAJA).

4.4.5 **Case Law**

- 4.4.5.1 Public Protector v Mail and Guardian Ltd (422/10) (2011) ZASCA 108;
- 4.4.5.2 Democratic Alliance v South African Broadcasting Corporation Ltd & others 2015 (1) SA 551 (WCC).

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

5.1 Regarding whether there was an undue delay by the IRBA to investigate and finalise an investigation into a complaint lodged by Mr Makate, and if so, whether such conduct constitutes maladministration:-

Common cause facts

- 5.1.1 It is not in dispute that the Complainant lodged a complaint with the IRBA dated 16 April 2018, in the form of an affidavit as prescribed in terms of Rule 2.2 of the Disciplinary Rules of the IRBA. The Complainant's matter was allocated reference number K1/2/3831A by the IRBA.

-
- 5.1.2 On 23 May 2018, the IRBA sent a letter acknowledging receipt of the complaint to the Complainant, and the following information was noted from the letter:
- 5.1.2.1 The IRBA confirmed that the complaint was at that time perused by the Board's internal investigators and that it was also raised with the responsible auditor at Price Waterhouse Cooper (PWC). Further, a decision was taken not to institute an investigation against KPMG and Deloitte and the reasons therefor were also explained to the Complainant.
- 5.1.2.2 The investigation process of the IRBA and the extent of authority was explained to the Complainant.
- 5.1.2.3 It is also noted from the letter that the IRBA "*does not normally write to the Complainants simply to inform that the matter is being dealt with but only notify the Complainants when there are developments or when there is specific information that is required from the Complainants*".

Issues in dispute

- 5.1.3 The issue for determination is whether there was an undue delay by the IRBA to investigate and finalise an investigation into a complaint lodged by Mr Makate, and if so, whether such conduct constitutes maladministration.
- 5.1.4 According to the Complainant, as per his complaint to my office dated 28 January 2020, the IRBA unduly delayed to finalise the investigation into his complaint. He further stated that the IRBA has failed to provide him with regular feedback on his complaint and that upon making enquiries, the IRBA failed to provide him with specific timeframes upon which his complaint would be finalised.

-
- 5.1.5 On 22 July 2020, the Public Protector Investigation team (the investigation team) sent an enquiry letter to the IRBA to solicit a response to the Complainant’s allegations. In a response letter dated 05 August 2020, the IRBA confirmed that the complaint lodged by the Complainant was still under investigation and that it was anticipated that the matter will be tabled before the Investigating Committee (the IC) on 03 December 2020. Thereafter, the matter would be tabled before the Disciplinary Advisory Committee (the DAC) for a final decision on the matter.
- 5.1.6 The IRBA further submitted that it has always responded to the Complainant’s requests for feedback on the status of the investigation and that the IRBA had also contacted the Complainant telephonically in response to a “tweet” that he published on social media. In support thereof, the IRBA submitted the following evidence:
- 5.1.6.1 An acknowledgement letter dated 23 May 2018;
 - 5.1.6.2 A copy of an article by Destiny Man Magazine dated 25 May 2018;
 - 5.1.6.3 A letter dated 28 May 2018, from the IRBA to the Complainant;
 - 5.1.6.4 An email correspondence dated 07 June 2018, from the Complainant to the IRBA;
 - 5.1.6.5 An email correspondence dated 02 August 2018, from the IRBA to the Complainant;
 - 5.1.6.6 An email correspondence dated 26 February 2019, from the IRBA to the Complainant; and
 - 5.1.6.7 Copy of the Complainant’s tweet dated 18 November 2018.

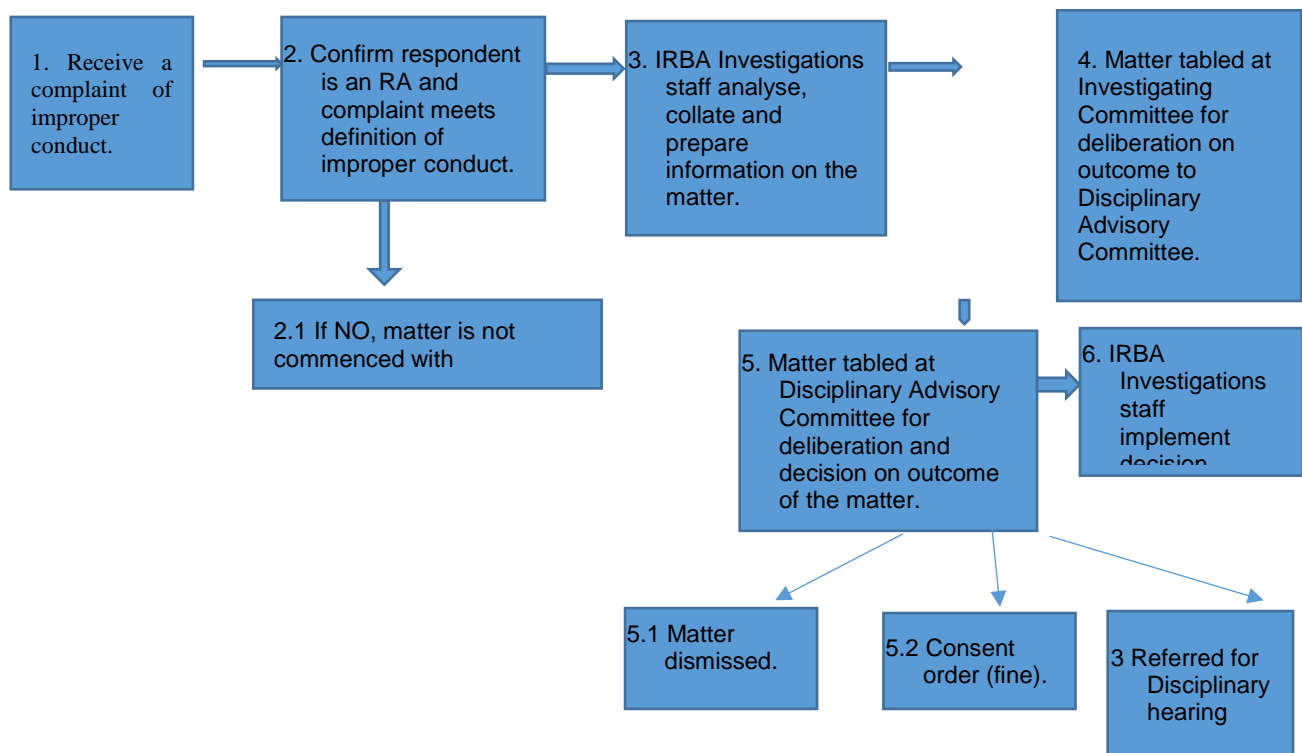
-
- 5.1.7 The following information is noted from the evidence submitted by the IRBA:
- 5.1.7.1 In a letter dated 28 May 2018 from the IRBA to the Complainant, the IRBA was clarifying the extent of the IRBA's investigative authority following an article in the Destiny Man Magazine dated 25 May 2018.
- 5.1.7.2 In an email correspondence dated 07 June 2018, the Complainant was clarifying the issue of the article published in the Destiny Man Magazine.
- 5.1.7.3 In an email correspondence dated 02 August 2018, the IRBA was providing feedback to the Complainant, in response to an email enquiry dated 01 August 2018 from the Complainant.
- 5.1.7.4 In an email correspondence dated 26 February 2019, the IRBA was providing feedback to the Complainant, in response to an email enquiry dated 25 February 2019 from the Complainant. On the same email, the IRBA did not provide the Complainant with a projected date upon which the investigation would be concluded.
- 5.1.7.5 A copy of a tweet dated 23 November 2019 by the Complainant, acknowledging that he has been contacted by the IRBA and that feedback on the matter was provided to him.
- 5.1.8 The IRBA informed the investigation team of the challenges faced by its office, which included but is not only limited to high volume of complaints with limited capacity / resources to finalise the investigations. The IRBA explained further that its investigating component currently consists of only 4 investigators. Furthermore, that the Complainant's matter falls within a list of outstanding matters that must be finalised within the 2020 – 2021 financial year.

5.1.9 The IRBA disputed the fact that there was an undue delay to finalise the complaint lodged by the Complainant.

5.1.10 After consultation with the Complainant, a follow up enquiry letter was sent to the IRBA on 02 September 2020 to request additional information on the matter. The IRBA responded to the follow up enquiry through a letter dated 22 September 2020, summarised as follows:

5.1.10.1 The IRBA submitted that the IC meets at least every quarter in a year and that the DAC only sits two (2) months after the IC.

5.1.10.2 Further to the above, the IRBA investigation process was explained through submission of the IRBA work flow processes as follows:



5.1.10.3 The IRBA again confirmed that the matter was at that time still under investigation, i.e. stage three (3) of the above workflow process and that the

process includes collecting of all relevant information and/or documents, analysing the information and preparing the matter to be tabled before the IC.

- 5.1.10.4 The IRBA submitted that the investigation process on complaints relating to the allegations of improper conduct by any Registered Auditor (RA) are guided by section 48 and 49 of the Auditing Profession Act, 26 of 2005 read together with the Disciplinary Rules promulgated on 07 June 2007.
- 5.1.10.5 The IRBA alluded that due to the complexity of the Complainant's matter, the investigation was allocated to a Senior Investigator and according to his work-plan, the matter was to be tabled before the IC on 03 December 2020.
- 5.1.10.6 The IRBA made further submissions that communication to the Complainants who report complaints to the IRBA, is as follows:
- 5.1.10.6.1 During the initiation phase of the investigation;
- 5.1.10.6.2 If required during the investigation analysis phase; and
- 5.1.10.6.3 After the Disciplinary Advisory Committee – communicating the decision taken by the Committee.
- 5.1.11 On 02 October 2020, an email enquiry was sent to the IRBA requesting further clarity on the issue of the prescribed timeframes pertaining to the IRBA investigation process.
- 5.1.12 On 02 October 2020, a response was received from the IRBA confirming that there are no set timeframes in place for the performance of an investigation. The time required per investigation differs on a case by case basis relative to the complexity of a matter.

5.1.13 On 20 October 2020, the Complainant made the following submission to be considered by the investigation team:

5.1.13.1 *“That there was no need for the IRBA to conduct an investigation against PWC on the matter but the IRBA was supposed to have requested a representation from PWC regarding the invoices that were processed by Vodacom and audited by PWC during 2016. There was no investigation that the IRBA was supposed to do – they simply needed representations from PWC regarding the invoices that were processed by Vodacom and audited by PWC, moreover this is a matter that was disclosed in both Vodacom and Vodafone’s audited financial statements both audited by PWC during 2016”.*

5.1.14 In an article published by the Daily Maverick dated 09 November 2020 titled *“IRBA soft touch audit regulator in turmoil”* the following is stated:

The Independent Regulatory Board for Auditors (IRBA) is the regulator tasked with holding auditors to account in cases of misconduct, unlawful or unethical behavior. As detailed in Open Secrets’ Corporations and Economic Crime Report (CECR): The Auditors – the IRBA has repeatedly failed to live up to this task. The evidence shows that the IRBA does not have sufficient powers to be an effective regulator. It has also often failed to use the powers it does have to effectively deter unlawful conduct by registered auditors.

..... It has also not shown the necessary commitment to transparency and openness that would build public trust in its processes.....”

5.1.15 On 19 January 2021, an enquiry was sent to the IRBA requesting the outcome of the IC that was said would sit on 3 December 2020. The IRBA submitted a report stating the following:

-
- 5.1.15.1 The IRBA confirmed that the matter was tabled before the IC held on 09 December 2020 and that a recommendation was made to the DAC.
- 5.1.15.2 On 14 January 2021, the DAC sat and a final decision was taken on the Complainant's matter. The outcome of the DAC was communicated to the Complainant on 15 January 2021. Copy of a letter dated 15 January 2021 addressed to the Complainant was furnished to the investigation team as proof that the outcome was communicated to the Complainant.
- 5.1.16 On 28 January 2021, feedback on the matter was communicated to the Complainant. On 1 February 2021, an email correspondence was received from the Complainant, addressed to the IRBA and copied to the investigation team. The Complainant was expressing his displeasure in a manner in which his complaint was handled by the IRBA.
- 5.1.17 Subsequent to the above email from the Complainant, an email correspondence was received from the IRBA on 01 February 2021, requesting the investigation team to visit its offices to review or inspect the investigation file.
- 5.1.18 The investigation team visited the offices of the IRBA on 11 February 2021 to inspect the investigation file and to seek clarity based on the comments raised by the Complainant on 01 February 2021. Below is what transpired during the inspection/ meeting:
- 5.1.18.1 The investigation team inspected the IRBA investigation file. Among the records perused was the Investigation Report prepared by the Investigator who was handling the matter, Mr Erhardt Bahlmann;
- 5.1.18.2 From the evidence on file and through the discussions, it was noted that the complaint dated 16 April 2018 was received by the IRBA on 20 April 2018;

-
- 5.1.18.3 The consideration of the complaint started on 23 May 2018, wherein an acknowledgement letter was sent to the Complainant and a request to the RA concerned to respond to the allegations and to submit documentary evidence thereto;
- 5.1.18.4 The RA responded to the IRBA and submitted all the requested supporting documentation on 22 June 2018;
- 5.1.18.5 The investigation file was then filed, waiting to be allocated and for investigation to continue. The IRBA submitted that at the time when the file is awaiting allocation, the file remains active and if enquiries are received from either party, the file is drawn from the storage facility so as to respond to an enquiry and then placed back in the storage facility;
- 5.1.18.6 Allocation of investigation files takes place on an annual basis and when allocation is being conducted, there is a mix of matters allocated between high profile matters, public interest entity matters and other matters. The Complainant's matter was classified as a matter with public interest;
- 5.1.18.7 During April 2020, the plan was approved or confirmed by the Board and the file was allocated to an investigator to attend to the matter during the 2020 – 2021 financial year;
- 5.1.18.8 The IRBA submitted that in terms of their processes, they do not conduct any interviews. Their investigations are based on documentary evidence that is collated from the Complainant and the RA;
- 5.1.18.9 The role of the IRBA is to assess the evidence collated, analyse and make a submission in the form of an investigation report to the committees;

-
- 5.1.18.10 The Complainant's matter was presented before the IC on 9 December 2020 and before the DAC on 14 January 2021.
- 5.1.18.11 The decisions of the IC and the DAC are recorded in the minute books. It was noted that only the decisions are recorded in the minute books and not the deliberations by the committee members. Copies of the minute books were obtained and the outcome pertaining to the Complainant's matter were recorded under I.1320 from the IC and DAC 929 from the DAC respectively;
- 5.1.18.12 A closing letter was sent to the Complainant on 15 January 2021;
- 5.1.18.13 It was explained to the investigation team that the IRBA Investigating Committee comprises of ten (10) non-executive members with *inter alia* the following qualifications:
- 5.1.18.13.1 Five (5) are Chartered Accountants (CA's) but not practising;
- 5.1.18.13.2 Three (3) Attorneys / Advocates; and
- 5.1.18.13.3 Two (2) with MBA's.
- 5.1.18.14 The IRBA Board has three (3) sub-committees and the chairperson does not serve on any of the sub-committees, i.e.:
- 5.1.18.14.1 The Operations Committee, the Audit and Risk Committee and the Disciplinary Advisory Committee.
- 5.1.18.15 It is also noted that the IRBA investigating staff comprises of 4 investigators with a current case load of 271 matters/ files currently on hand thus means, the average case load per investigator is 67 files.
- 5.1.19 On 18 June 2021, a notice in terms of section 7(9) of the Public Protector was issued to the then Minister of Finance, Minister Tito Mboweni and Mr Imre Nagy,

the Acting Chief Executive Officer of the IRBA, affording them an opportunity to respond to the evidence obtained during the investigation and the intended findings. The notice was dispatched on 21 June 2021. An acknowledgement of receipt of the notice was received from the office of the Minister on 21 June 2021 and a response to the notice was received from the IRBA on 01 July 2021.

5.1.20 **The IRBA's response to my section 7(9) notice dated 01 July 2021 detailed as follows:**

At paragraph 2 of the response dealing with the scope of the investigation / complaint:-

5.1.20.1 The IRBA acknowledged to have been informed by my office on 22 July 2020 by way of a letter that the Complainant has lodged a complaint with my office against the IRBA on allegations of failure to conduct an investigation and/or undue delay to finalise an investigation. The IRBA submitted that they always understood the complaint lodged against the IRBA to be confined to whether there was delay or undue delay in concluding the Complainant's matter.

5.1.20.2 Upon perusal of the notice, it was noted that "*the scope of the investigation has been extended to include allegations of maladministration by the IRBA. This is contrary to what was communicated to the IRBA at the inception of the investigation and in subsequent engagements with the office of the PP*".

5.1.20.3 The IRBA submitted that "*it is trite that for the PP to perform her constitutional functions as provided for under section 182 of the Constitution, the PP has been given extensive investigation and remedial powers. We are aware that, in addition to the powers vested on her by the Constitution, the provisions of section 6 (4) (a) (i) and (ii) of the Public Protector Act 23 of 1994 ("The PP Act*

“) have given the PP the power to investigate on her initiative or on receipt of a complaint any alleged maladministration.

5.1.20.4 *Notwithstanding the above, at no point during our engagement with the office of the PP, were we advised that the scope of the investigation had been extended to include allegations of maladministration. Consequently, the IRBA has previously not been afforded an opportunity to make representations to disprove allegations of maladministration.*

5.1.20.5 *It is our view that the PP like other public functionaries must exercise her powers in accordance with the provisions of section 33 of the Constitution. As the PP correctly points out in the notice, section 33 of the Constitution protects the right to fair administrative action. This right in this instance, inherently obligates the PP to afford any persons and/or institution which may potentially be adversely affected by her decision, an opportunity to make representations and/or to be heard.*

5.1.20.6 *The IRBA denies that its conduct during its investigation of Mr Makate’s complaint constituted maladministration.*

5.1.20.7 *Maladministration means an act or omission based on improper considerations or conduct. Maladministration arises when one fails to carry out a duty imposed by law or from action which goes beyond the powers conferred by the law or fails to follow the procedure laid down by the law.*

5.1.20.8 *Mr Makate was advised from the inception that the investigation into his complaint was going to be conducted by the IRBA pursuant to the provisions of the Auditing Profession Act 26 of 2005 and the Disciplinary Rules of June 2007.*

5.1.20.9 *The IRBA followed the above legislative framework during its investigation of the complaint. We are therefore uncertain how or on what basis the PP found that the IRBA's conduct constituted maladministration".*

5.1.20.10 The IRBA further submitted that "*the type of matters they deals with may or may not involve protracted investigations. It is for this reason that the length of time within which to conclude an investigation is not prescribed by either the Auditing Profession Act or the Disciplinary Rules. On the basis hereof, a delay in concluding an investigation cannot be regarded as maladministration*".

At paragraph 3 of the response with subject heading Undue or Unreasonable Delay:

5.1.20.11 The IRBA disputed the finding made in the notice and argued that they did not contravene section 33 of the Constitution as contemplated in the notice, in that their conduct was not unlawful, unreasonable and procedurally unfair.

5.1.20.12 Further that the IRBA did not contravene the provisions of PAJA as contemplated in the notice, in that the decisions taken by the IRBA as a result of its investigation do not adversely affect the Complainant's rights or legitimate expectations and were effected in accordance with a fair procedure.

5.1.20.13 The IRBA acknowledged that "*the functions performed by the IRBA accord with the common law definition of administrative action since they involve the exercise of public power which has been vested on the IRBA pursuant to the provisions of the Auditing Profession Act 26 of 2005 and the Disciplinary Rules of June 2007*".

-
- 5.1.20.14 The IRBA stated that although the Public Protector acknowledges that the IRBA has capacity constraints, the notice did not seem to take into account the constraints on the IRBA's ability to deal with all the matters timeously as follows:
- 5.1.20.14.1 That at the time when the complaint was lodged by the Complainant, there were only 4 investigators appointed by the IRBA, i.e one Senior Investigator, an Investigator, and two (2) new Investigators;
- 5.1.20.14.2 That the IRBA as at that time had 254 open matters and planned to complete 91 matters within the financial year, which included Mr Makate's;
- 5.1.20.14.3 That due to the complexity of the issues that were involved in Mr Makate's complaint the Senior Investigator was allocated to the matter; and
- 5.1.20.14.4 That, in the absence of adequate human resources, the IRBA could not allocate the matter for investigation sooner. The matter was duly allocated as soon as a resource became available and was completed within a reasonable period.
- 5.1.20.15 The IRBA argued that based on the above circumstances, the provisions of the Auditing Profession Act and the Disciplinary Rules, the IRBA's reasons for the delay in finalising Mr Makate's complaint were reasonable and cannot be considered undue.
- 5.1.20.16 With regard to my intended finding that "*the IRBA failed to provide regular feedback on the status of the matter to Mr Makate*", the IRBA submitted that they dispute the finding and accordingly did not contravene the provisions of section 33 of the Constitution and PAJA.

5.1.20.17 The IRBA argued that “*the Auditing Profession Act and the Disciplinary Rules of June 2007, do not require the IRBA to give regular updates to a complainant on the status of the investigation into their complaint. The IRBA further stated that Mr Makate was advised in the letter dated 23rd May 2018, not to have an expectation to be given consistent and/ or regular feedback on his complaint. Mr Makate was further advised that he will be notified if there are developments on his matter or if there is specific information required from him*”.

5.1.20.18 The IRBA submitted they have replied to Mr Makate’s requests for an update on the matter on various occasions even though there was no legal duty on their part to provide constant and/or regular feedback and that he was further advised of the outcome of the investigation.

At paragraph 4 of the response with subject heading factual inaccuracies

5.1.20.19 The IRBA brought to my attention the information that was not accurately reflected in the notice and subsequently, the amendments are effected accordingly in this report.

5.1.20.20 The IRBA submitted that “*in the financial year 2020/21, of the completed matters, 60% were other matters. In total on all open matters there are 69% other matters. It is therefore not factually correct that there is preference or priority accorded to certain matters whilst other matters are “placed on the back burner*”.

At paragraph 5 of the response with the subject heading recommended remedial action

-
- 5.1.20.21 With reference to my intended remedial action as stated in my notice that *“the IRBA should develop standard operating procedures for conducting investigations”*. The IRBA submitted that even though they do not have a standard operating procedure manual, in addition to conducting investigations in line with the Auditing Profession Act and the Disciplinary Rules, investigations are subject to the following procedures:
- 5.1.20.21.1 *“targets are set annually on how many matters the IRBA intends to investigate and matters are tabled quarterly at committee meetings for decisions on outcome and quarterly reports are submitted to National Treasury; and*
- 5.1.20.21.2 *once a matter has been allocated to an investigator, the Director of Investigations receives weekly updates from the investigators on the matters they are busy with and attends to any queries arising”*.
- 5.1.20.22 The IRBA made a further submission that *“the delay in finalising investigations has not been caused due to a lack of standard operating procedures, so we find it difficult to reconcile the need to institute procedures that do not address the cause of the delay, which is a lack of capacity to attend to the investigations”*.
- 5.1.20.23 Pertaining to the fact that the IRBA be “capacitated.” The IRBA made reference to their Strategic Plan for 2021-2025 and Annual Performance Plan for 2021-2022 whereby the IRBA committed to *“ensuring that it is adequately capacitated through the filling of vacancies and recruiting additional investigators to conduct the investigations. In terms of the Strategic Plan, the IRBA has received approval to increase the number of its investigators from four to nine. To date, seven (7) positions have already been filled and the IRBA is in the process of recruiting two additional investigators. In addition, the IRBA has contracted a retired inspector to assist with the backlog on investigations”*.

5.1.20.24 The IRBA made a further submission that a request for funding will be submitted to National Treasury for the forensic departments at the law firms on the IRBA's panel of attorneys to second five (5) staff members to the IRBA for a period of twelve (12) months to eradicate the backlog of investigations and that should the request be approved, the IRBA will be in a position to process investigations in an on-line real time situation.

5.1.21 It has now come to my attention that the process of amending the Auditing Profession Act has been concluded and the Auditing Profession Amendment Act was signed into law by President Cyril Ramaphosa on 23 April 2021 and gazetted on 26 April 2021. The amendment gives the IRBA the necessary powers to deliver more efficiently and effectively on its mandate and will also assist with the restoration of confidence in both the IRBA and the profession.

Application of the relevant legal framework

The Constitution of the Republic of South Africa, 1996 (the Constitution)

5.1.22 Section 33 of the Constitution provides that everyone has the right to administrative action that is lawful, reasonable and procedurally fair.

5.1.23 The conduct of the IRBA also needs to be tested against the principles of public administration as envisioned in section 195(1) of the Constitution. Section 195(1)(d) states that services must be provided impartially, fairly, equitably and without bias. In addition, section 195(1) (f) requires that public administration must be accountable. In terms of section 195(1) (g), transparency must be fostered by providing the public with timely, accessible and accurate information.

5.1.24 Section 237 of the Constitution is also relevant, which provides that all constitutional obligations must be performed diligently and without delay. The IRBA and its officials are required to handle the complaints received with diligence and without any delay.

The Promotion of Administrative Justice Act 3 of 2000 (PAJA)

5.1.25 In terms of section 1 of PAJA “*administrative action*” is defined as any decision taken, or any failure to take a decision, by an organ of state, when exercising a power in terms of the Constitution or a provincial constitution; or exercising a public power or performing a public function in terms of any legislation; or which adversely affects the rights of any person and which has a direct, external legal effect.

5.1.26 Section 1 defines that an “*administrator*” as an organ of state or any natural or juristic person taking administrative action.

5.1.27 In terms of Section 1 a “*decision*” *inter alia* means any decision of an administrative nature made, proposed to be made, or required to be made, as the case may be, under an empowering provision, including a decision relating to making a declaration, demand or requirement or doing or refusing to do any other act or thing of an administrative nature, and a reference to a failure to take a decision must be construed accordingly.

5.1.28 Section 3(1) provides that administrative action which materially and adversely affects the rights or legitimate expectations of any person must be procedurally fair. In terms of Section 3(2)(a) a fair administrative procedure depends on the circumstances of each case.

5.1.29 Section 3(2)(b) provides that in order to give effect to the right to procedurally fair administrative action, an administrator, subject to subsection (4) must give

a person referred to in subsection (1) adequate notice of the nature and purpose of the proposed administrative action; a reasonable opportunity to make representations; a clear statement of the administrative action; adequate notice of any right of review or internal appeal, where applicable; and adequate notice of the right to request reasons in terms of Section 5.

5.1.30 The conduct of the IRBA also had to comply with general principles of good administration. In this regard, guidance was sought from section 33, section 195, section 237 of the Constitution and PAJA which outlines principles of good administration.

5.1.31 It is trite that administrative decisions must be taken within a reasonable period. The decisions taken by the IRBA relating to their investigation processes such as the allocation of investigation files falls within the context of section 33, 195 and 237 of the Constitution and PAJA.

5.1.32 In light of the above, the IRBA was required to take administrative decisions within reasonable timeframes.

5.1.33 Further, the IRBA Rules are found not to be in compliance with section 237 of the Constitution provides that all constitutional obligations must be performed diligently and without delay.

The Auditing Profession Act, 26 of 2005 (the Auditing Profession Act)

5.1.34 The Auditing Profession Act has been established in order to provide for the establishment of the Independent Regulatory Board for Auditors; to provide for the education, training and professional development of registered auditors; to provide for the accreditation of professional bodies; to provide for the

registration of auditors; to regulate the conduct of registered auditors and to provide for matters connected therewith.

5.1.35 Section 1 of the Auditing Profession Act defines improper conduct as *“any non-compliance with this Act or any rules prescribed in terms of this Act or any conduct prescribed as constituting improper conduct”*.

5.1.36 Section 3 (2) of the Auditing Profession Act explains further that the IRBA is subject to the Constitution as the supreme law of the country.

5.1.37 Section 4 (1)(a) explains the general functions of the IRBA to include but not only limited to taking steps in order to promote the integrity of the auditing profession, including:

- (i) investigating alleged improper conduct;*
- (ii) conducting disciplinary hearings;*
- (iii) imposing sanctions for improper conduct; and*
- (iv) conducting practice reviews or inspections”.*

5.1.38 Section 48 of the Auditing Profession Act explains the investigation process relating to a charge of improper conduct as follows:

- (1) *“The Regulatory Board must refer a matter brought against a registered auditor to the investigating committee appointed under section 20 if the Regulatory Board:
on reasonable grounds suspects that a registered auditor has committed an act or is of the opinion that a complaint or allegation of improper conduct, whether prescribed or not, which has been made against a registered auditor by any person appears to be justified.*

-
- (3) *The investigating committee must investigate the matter, obtain evidence to determine whether or not in its opinion the registered auditor concerned should be charged and, if so, recommend to the Regulatory Board the charge or charges that may be preferred against that registered auditor.*
- (5) (a)(i) *In investigating a charge of improper conduct the investigating committee requires the registered auditor to whom the charge relates or any other person to produce to the committee any information, including but not limited to any working papers, statements, correspondence, books or other documents, which is in the possession or under the control of that registered auditor or other person and which relates to the subject matter of the charge, including specifically, but without limitation, any working papers of the registered auditor;*
- (ii) *inspect and, if the investigating committee considers it appropriate, retain any such information for the purposes of its investigations; and*
- (iii) *make copies of and take extracts from such information.*
- (7) *The investigating committee must, after the conclusion of the investigation, submit a report stating its recommendations to the Regulatory Board relating to the matter under investigation”.*

5.1.39 Section 49 (1) further states that “*the Regulatory Board must charge a registered auditor with improper conduct if the investigating committee recommends that sufficient grounds exist for a charge to be preferred against such a registered auditor*”.

-
- 5.1.40 The complaint lodged by the Complainant with the IRBA related to allegations of improper conduct against an RA who was working at PWC and thus meets the requirements to be investigated by the IRBA in line with section 48.
- 5.1.41 The investigation team noted the submission made by the Complainant on 20 October 2020 and the contents of section 48 of the Auditing Profession Act, and it can therefore be concluded that the IRBA is by law bound to comply with the stipulated provisions when conducting an investigation. Accordingly, I am not in a position to interfere with the IRBA's internal processes as mandated by the Auditing Profession Act.
- 5.1.42 It is also noted in an affidavit that was submitted by the Complainant to the IRBA dated 16 April 2018 wherein he stated that *"Based on this affidavit I am willing to assist any authority and will support any investigation that shall ensue because I consider the above concerns serious and warranting a full and proper investigation by independent authorities authorised to do as provided by our constitutional democracy"*. This statement on its own is interpreted to mean that the Complainant requested the IRBA to conduct a full investigation on the matter and not only to obtain a representation from the PWC auditors and thereafter close the matter. Again, the Complainant clearly stated that his complaint should be fully investigated.

REPEAL OF THE DISCIPLINARY RULES MADE UNDER THE PUBLIC ACCOUNTANTS' AND AUDITORS' ACT, 80 OF 1991 AND ADOPTION OF NEW DISCIPLINARY RULES ON 07 JUNE 2007 (THE DISCIPLINARY RULES)

- 5.1.43 Clause 2.3.1 of the Disciplinary Rules promulgated on 7 June 2007, prescribes 30 days for the respondent to respond to the notice by the IRBA.

*“In order to establish whether the grounds for referral to the Investigating Committee are present, the Director: Legal or the CEO may notify the respondent in writing of the nature of the complaint and call upon that respondent to furnish a written explanation in answer to the complaint within **30 days of such notice**”.*

- 5.1.44 Clause 1.1.13 defines “the respondent to mean a registered auditor whose conduct is the subject of any proceedings of whatever nature including a complaint or a decision whether or not to refer such conduct to investigation”.
- 5.1.45 From the onset of the PPSA investigation, the IRBA disputed the fact that they unduly delayed to finalise the investigation into a complaint lodged by the Complainant. The submissions made by the IRBA was that the Complainant’s matter was classified as a complex matter and it further explained the internal challenges faced by the office relating to the shortage of resources.
- 5.1.46 My investigation team noted that a 30 day period is provided to the respondents / RA’s to respond to a notice by the IRBA in terms of Clause 2.3.1 of the Disciplinary Rules. However, there are no time frames prescribed by either the Auditing Profession Act or the Disciplinary Rules to regulate the IRBA’s own investigation process. Same applies to the manner in which feedback is to be provided or communicated to the Complainants of the IRBA.
- 5.1.47 Upon analyses of the evidence, it is noted that the IRBA received a complaint from the Complainant on 20 April 2018. The IRBA requested information and documentary evidence from the RA on 23 May 2018. The RA responded to the IRBA on 22 June 2018. The Allocation of the file was however only done in April 2020. Therefore, it took the IRBA almost 22 months to allocate the file and for the matter to be investigated and attended to. Even though it was submitted that the file remained active, the file was factually dormant as no investigation

activities were taking place thereon. From the date of allocation i.e. April 2020 until the date of the final letter i.e. 15 January 2021, it took the IRBA nine (9) months to conduct and finalise the investigation.

5.1.48 It is observed that communication or providing feedback to Complainants is “not regularly done” by the IRBA. Communication is done only when there is a need (according to the IRBA) to do so, e.g. upon receipt of an enquiry. The standard applicable at the current moment is as follows:

5.1.48.1 Communication during the initiation phase of the investigation;

5.1.48.2 If required during the investigation analysis phase;

5.1.48.3 After the Disciplinary Advisory Committee – communicating the decision taken by the Committee, and/or

5.1.48.4 Only when enquiries are received from the Complainants.

5.1.49 From the evidence discovered during the investigation process, the IRBA only communicated feedback to the Complainant upon receipt of the enquiries from the Complainant and upon noting a “tweet” by the Complainant regarding the manner in which his complaint was being handled by the IRBA.

5.1.50 It is observed that based on the current processes followed within the IRBA, should a complaint be classified as “a complex matter” it could take the IRBA years to finalise an investigation. In this period, the IRBA will only communicate with the complainant if he makes an enquiry. In addition, the IRBA does not require any information and/or clarity from the Complainant. If no enquiries are being made by the Complainant to the IRBA, it will result in no feedback to be communicated to the Complainant by the IRBA. Accordingly, the Complainant

will be kept in the dark indefinitely or for many years until such time that his/her complaint is finalised and the final outcome is communicated.

- 5.1.51 In line with the Constitution, the IRBA is required to be responsive at all time. The approach by the IRBA to provide feedback to the Complainant if required during the investigation analysis phase, or when an enquiry is received, cannot be regarded as being responsive at all.
- 5.1.52 The time span between the meetings of the different committees i.e. the IC and the DAC is quite far apart (the difference of two (2) months) and is thus another contributing factor to unnecessary delays in order to finalise investigations at the IRBA. However, it must be stated that the period taken from the 9 December 2020 (IC sitting) and the DAC (held on 14 January 2021) was within a reasonable space of time.
- 5.1.53 It is also observed that the challenges of insufficient human resources / lack of capacity was another contributing factor to the delay to allocate and finalise the investigations. However, I have noted from the IRBA response to my section 7(9) notice that the issue of capacity has now been addressed, as the IRBA has now acquired more investigating staff and further requested additional funding in order to enhance their investigation capacity, so as to eradicate the backlog of investigations.
- 5.1.54 Reference is also made to the *Daily Maverick* article wherein the same issues relating to lack of transparency, openness and no urgency within the IRBA was stated as a concern. This conduct by the IRBA will lead to the loss of public confidence and trust, thus rendering IRBA ineffective.
- 5.1.55 Furthermore, the process of amending the Auditing Profession Act has been concluded and the Auditing Profession Amendment Act was signed on 23 April

2021. The amendment enhances the efficiency and effectiveness of the IRBA's investigation and disciplinary processes.

5.1.56 As stipulated in section 182 of the Constitution and section 6(4) of the Public Protector, nothing prevents me from making any finding that is found during the process of my investigation as a result of any conduct in state affairs. Once such conduct is found, I cannot turn a blind eye on the matter but must come up with ways and processes in order to remedy the situation so as to prevent such conduct from occurring in the future.

5.1.57 In terms of the Guidelines laid down by the Courts, the power to take appropriate remedial action in terms of section 182(1) (c) of the Constitution connotes “the active imposition of a remedy to correct an identified problem¹³”, this means that the Public Protector must seek out and effect the rectification of maladministration, through directing appropriate remedial steps so as to ensure good governance¹⁴ and to prevent similar maladministration occurring again in the future.

5.1.58 With reference to the lack of set timeframes to conduct and finalise investigations, and providing regular feedback to Complainants, surely these cannot be regarded as good practice for an institution such as the IRBA. Complainants need to be informed on regular basis on the status of their complaints as assurance that their matters are receiving attention. This will also build more confidence and trust from the side of members of the public.

5.1.59 It is noted from the response by the IRBA to the notice that in addition to the Auditing Profession Act and the Disciplinary Rules, the IRBA investigations are

13 (393/2015) [2015] ZASCA 156 (8 October 2015).

14 [2018] 2 All SA 311 (SCA).

also subject to certain procedures such as providing weekly updates to the Director of Investigations by the respective investigators on the matters that were allocated for investigation. However, the IRBA does not see it to be their responsibility to provide constant and/or regular feedback to the Complainant(s).

5.1.60 In the case of ***Public Protector v Mail and Guardian Ltd (422/10) (2011) ZASCA 108 (1 June 2011)***, the court held that the Public Protector is not a passive adjudicator between the citizens and the state, relying only upon evidence which is placed before her by the parties. The Supreme Court of Appeal (SCA) held further that the Public Protector should not be bound or be limited to the issues raised for consideration and determination by the parties but should, investigate further and discover the truth and also inspire confidence that the truth has been discovered.

5.1.61 The court further made it clear that the mandate of the Public Protector is an investigatory one, requiring pro-action in appropriate circumstances. Although the Public Protector may act upon complaints that are made, he or she may also take the initiative to commence an enquiry, and on no more than '*information that has come to his or her knowledge*' of maladministration, malfeasance or impropriety in public life. The court emphasised that the Public Protector has a pro-active function. He or she is expected not to sit back and wait for proof where there are allegations of malfeasance but is enjoined to actively discover the truth.

5.1.62 Informed by the above judicial precedent, my office discovered during the process of investigation the issue of maladministration. Accordingly, on own initiative considered the issue of maladministration during the investigation. As a result, the issue of lack of prescribed timeframe regulating the IRBA investigation process and the manner in which the investigation files are

allocated by the IRBA was independently discovered by my office. It was not raised by the Complainant in his original complaint which he filed with my office. As an investigatory and oversight body, I could not turn a blind eye to this discovery, but I immediately extended the scope of my investigation to cover this issues as well.

5.1.63 I have deliberately decided to cite the above case law and further laid this short background in order to address or dispel any misguided notion or contention that I have unduly extended the scope of this investigation without just cause.

5.1.64 The principle of legality in South African law is enshrined in section 2 of the Constitution, which provides that:

“This Constitution is the supreme law of the Republic; law or conduct inconsistent with it is invalid, and the obligations imposed by it, must be fulfilled.”

5.1.65 The constitutional principle of legality requires that a decision maker exercises the power conferred upon her/him diligently and without delay.

5.1.66 It follows therefore that the Constitution required the IRBA to exercise their power/duties and further taking administrative decisions within the prescribed regulatory framework as stated above. Therefore, the IRBA Rules are found not to be in compliance with the Constitution.

5.1.67 In compliance with section 33 of the Constitution, your attention is further drawn to the provisions of section 7(9) of the Public Protector Act and clause 43 (1) of the Public Protector Rules under the heading adverse findings of Public Protector which states that *“the Public Protector shall, if it appears that any person or state institution is implicated in a complaint being investigated, before*

reporting on or publishing any adverse findings pertaining to that person, in writing inform the person or organ of state accordingly and give the person or state institution a reasonable opportunity subject to the timeframes specified in rule 24(2), to bring any evidence or information having the potential to influence the findings of the Public Protector, to her or his attention”.

5.1.68 It was on the basis of the above legislation and further in compliance with the *Audi Alteram Partem* Rule that a section 7(9) notice was issued on 18 June 2021, so that the IRBA can make any representation on the matter before conclusion of the investigation.

5.1.69 It is observed that during June 2021, the then Minister of Finance, Minister Tito Mboweni appointed the new Board of Directors (the Board) of the IRBA. In terms of the Media Statement released by the Ministry of Finance dated 13 June 2021, the Board’s immediate task amongst others is to work with management to restore staff morale. The Board is also expected to strive to restore the credibility of the institution and auditing profession.

Conclusion

5.1.70 From the evidence discussed above, it is clear that the IRBA failed to implement proper processes to ensure that the complaints are resolved expeditiously.

5.1.71 The IRBA also failed to provide regular feedback to the Complainant and only responded when prompted by the Complainant to do so.

5.1.72 Therefore, the conduct by the IRBA was in violation of sections of the Constitution.

6. FINDINGS

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

6.1. **Regarding whether there was an undue delay by the IRBA to investigate and finalise an investigation into a complaint lodged by Mr Makate, and if so, whether such conduct constitutes maladministration:-**

6.1.1 The allegation that there was an undue delay by the IRBA to finalise an investigation into a complaint lodged by Mr Makate, is substantiated.

6.1.2 It is however acknowledged that the investigation - from the time the matter was allocated to a Senior Investigator for investigation - was conducted and finalised within a reasonable period. In that the plan was approved or confirmed by the Board during April 2020 and the investigation was concluded on 14 January 2021 i.e. nine (9) months. However, the IRBA failed to allocate the file to an investigator within a reasonable time. The file was only allocated to the investigator after more than 22 months, i.e. close to two (2) years, after it was received from the Complainant. Such a long delay is considered to be unreasonable, and constitutes maladministration.

6.1.3 The IRBA lacks adequate internal processes and service standards in which investigation timelines are prescribed and it further failed to implement proper processes to ensure speedy resolution of complaints.

6.1.4 The IRBA failed to provide the Complainant with regular feedback on his complaint and it only provided feedback when the Complainant enquired about

the progress of the investigation, or when negative media/social media communications were made.

6.1.5 The IRBA's system of allocating files annually to the investigators is found to be another contributing factor causing undue delay in finalising investigation files.

6.1.6 The conduct of the IRBA is in violation of the Constitution and thus constitutes improper conduct as envisaged in Section 182(1) of the Constitution and maladministration as envisaged in Section 6(4)(i) & (ii) of the Public Protector Act.

7. REMEDIAL ACTION

7.1 The appropriate remedial action in terms of section 182(1)(c) of the Constitution, are the following:

The Minister of Finance (the Minister):

7.1.1 The Minister to take cognisance of the envisaged remedial action; and

The Chairperson of the IRBA Board:

7.1.2 The Chairperson of the IRBA Board to take cognisance of the envisaged remedial action.

The Acting Chief Executive Officer, Mr Imre Nagy, of the IRBA must:

7.1.3 Within ninety (90) working days from the date of this final report, develop a Standard Operating Procedure Manual (SOP) and Service Standards to enhance the IRBA Rules when conducting investigations, with prescribed timelines within

which investigations should be conducted; to ensure continuous communication with Complainants and to ensure speedy resolution and turn-around times of complaints;

7.1.4 Ensure that all the investigating staff members are trained on the developed Standard Operating Procedure Manual and Service Standards within thirty (30) working days after it has been developed; and

7.1.5 Review the current process of allocation of investigation files to ensure that all the investigation files are allocated and attended to without delay and finalised within the prescribed timelines.

8. MONITORING

8.1 In monitoring the implementation of the remedial action as stipulated in paragraph 7.1.3 to 7.1.5 of this report, the Acting CEO of the IRBA is further required to submit to the Public Protector an implementation plan indicating how the aforementioned remedial action will be implemented within 30 working days from the date of issuing the report.

8.2 In line with the Constitutional Court Judgement in the matter of Economic Freedom Fighters v Speaker of the National Assembly and Others; Democratic Alliance v Speaker of the National Assembly and Others [2016] ZACC 11, and

in order to ensure the effectiveness of the Office of the Public Protector, the remedial actions prescribed in this Report are legally binding, unless set aside by a Court order.



ADV BUSISIWE MKHWEBANE
PUBLIC PROTECTOR OF THE
REPUBLIC OF SOUTH AFRICA
DATE: 22/10/2021