

**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**

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***Report on allegations of an irregularity in the approval of early retirement with  
full pension benefits***

**REPORT ON AN INVESTIGATION INTO ALLEGATIONS MALADMINISTRATION  
AND IMPROPRIETY IN THE APPROVAL OF MR IVAN PILLAY'S EARLY  
RETIREMENT WITH FULL PENSION BENEFITS AND SUBSEQUENT RETENTION  
BY THE SOUTH AFRICAN REVENUE SERVICE.**



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## **Executive Summary**

- (i) This is my 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 my findings and appropriate remedial action taken in terms of section 182(1)(c) of the Constitution following an investigation into allegations of maladministration and impropriety by Minister Pravin Gordhan, in his capacity as the erstwhile Minister of Finance, in the approval of Mr Ivan Pillay's (Mr Pillay's) early retirement with full pension benefits and his subsequent retention at the South African Revenue Service (SARS), on the recommendation of the then Commissioner of SARS, Mr Oupa Magashula (Mr Magashula).
- (iii) The complaint was lodged anonymously on 18 November 2016 alleging that Minister Gordhan approved, in his capacity as the then Minister of Finance and on the recommendation of Mr Magashula: -
  - a) Mr Pillay's application for early retirement and payment of his retirement package;
  - b) The further payment by SARS of a penalty in the amount of R1, 141 178, 11, which was levied on Mr Pillay's pension benefits by the Government Employees Pension Fund (the GEPF), which would allow him to enjoy full pension benefits as though he had retired at a statutory age; and
  - c) Mr Pillay's subsequent retention as the Deputy Commissioner of SARS on a fixed-term contract basis, following the approval of his early retirement

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- (iv) It is the Complainant's contention that Messrs Pillay and Magashula as well as Minister Gordhan's conduct amounted to maladministration in that they failed to prevent SARS from incurring irregular, fruitless and wasteful expenditure, and in so doing, violated section 86 read with sections 1, 38 and 39 of the Public Finance Management Act 1 of 1999.
- (v) The Complainant also contends that Mr Magashula and Minister Gordhan in essence acted dishonestly with regard to their dealings with public funds which resulted in Mr Pillay receiving an improper advantage or being unjustifiably enriched at the expense of the taxpayer.
- (vi) The Complainant further contends that the penalty levied by the GEPPF and subsequently paid by SARS, in the amount of R1, 141 178, 11 should be recovered from Messrs Pillay and Magashula as well as Minister Gordhan jointly and severally.
- (vii) On analysis of the complaint, the following issue was identified and investigated:
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- (a) Whether Minister Gordhan irregularly approved the early retirement of Mr Ivan Pillay with full pension benefits and his subsequent retention at SARS in the same position;
- (viii) The investigation was conducted by way of correspondence and interviews, an analysis of relevant documentation as well as the consideration and application of relevant laws, related prescripts and case law.
- (ix) Key laws and policies taken into account to determine if there is any irregularity in the approval of Mr Ivan Pillay's early retirement with full pension benefits were the following: -

- 
- a) Sections 92(3)(a) and 195 of the Constitution of the Republic of South Africa, 1996;
  - b) The relevant provision of the South African revenue Service Act, 1997 which in essence deems a person employed by SARS to be a person forming part of public service for the purpose of pension and retirement benefits;
  - c) Relevant provisions of the Public Service Act, 1994 which governs the pension rights of employees in public service; and
  - d) Relevant provisions of the Government Employees Pension Law, 1996 and Rules which make provision for the payment of pensions and certain benefits to persons in the employment of Government, certain bodies and institutions.
- (x) In addition, the following case law was used for the purpose of this investigation:
- - a) *Cool Ideas 1186 CC v Hubbard and Another* 2014 (4) SA 474 (CC) 484;
  - b) *Ity Capital SA Property Holdings LTD v Chavonnes Badenhorst St Clair Cooper and others* 2018(4) SA 71 (SCA);
  - c) *Fedsure Life Assurance Ltd and Others v Greater Johannesburg Transitional metropolitan Council and Others* 1999(1) SA 374 (CC);
  - d) *Minister of Public Works and Others v Kyalami Ridge Environmental Association and Another (Mukhwevho Intervening)* 2001 (3) SA 1151 (CC);



- 
- e) *Affordable Medicines Trust and Others v Minister of Health and Others* 2006 (3) SA 247 (CC); and
  - f) *Khumalo and Another v Member of the Executive Council for Education: KwaZulu-Natal* 2014 (3) BCLR 333 (CC).
- (xi) Having considered the evidence uncovered during the investigation against the relevant regulatory framework, I now make the following findings:
- (a) **Regarding whether Minister Gordhan irregularly approved the early retirement of Mr Ivan Pillay with full pension benefits and his subsequent retention at SARS in the same position: -**
    - (aa) The allegation that Minister Gordhan irregularly approved the early retirement of Mr Ivan Pillay with full retirement benefits and his subsequent retention at SARS is substantiated;
    - (bb) Since neither Mr Pillay's request for early retirement nor Mr Magashula's recommendation to Minister Gordhan contemplated retirement, there was no retirement in fact and in law. If there was no retirement in fact and in law, it can be concluded that Mr Pillay was not entitled to early retirement with full pension benefits under any statutory provision;
    - (cc) Even if retirement had been contemplated and there was in fact a retirement, Minister Gordhan was not authorised by section 16(2A) of the PSA to approve Mr Pillay's early retirement request with full pension benefits as this section does not confer any power on the Minister to approve early retirement with full pension benefits;



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- (dd) Mr Pillay was not entitled to early retirement with full pension benefits under section 16(2A) of the PSA because the section makes no provision for such full retirement benefits. Section 16(2A) of the PSA only confers a right on an employee to retire from public service upon reaching the age of 55 years. In terms of that section, no ministerial approval need be sought;
- (ee) Even if the request by Mr Pillay for early retirement had been sought in terms of section 16(6) of the PSA, Minister Gordhan would also not have been authorised by section 16(6)(a) read with subsection (b) of the PSA to approve Mr Pillay's full pension benefits because the benefits to which an employee is entitled to on early retirement are regulated by section 16(6)(b) of the PSA and occur by operation of law. No ministerial approval is required in such instances;
- (ff) Minister Gordhan's conduct therefore amounts to improper conduct as envisaged by section 6(4)(a)(ii) of the Public Protector Act;
- (gg) When Mr Magashula's made the recommendation to Minister Gordhan for the approval of Mr Pillay's early retirement without downscaling of his retirement/pension benefits, SARS, through Mr Magashula, took the **"action"** contemplated in section 17(4) of the GEPF Law and thereby triggering the additional liability to the GEPF;
- (hh) Payment of the additional liability by SARS amounted to irregular expenditure as envisaged by section 38(c)(ii) of the PFMA and maladministration as contemplated by section 6(4)(a) of the Public Protector Act;

- 
- (ii) Minister Gordhan also acted *ultra vires* in approving the retention of Mr Pillay as Minister Gordhan was not authorised by law to do so
- (xii) The appropriate remedial action I am taking in pursuit of section 182(1)(c), with the view of placing the Complainant as close as possible to where she would have been had improper conduct or maladministration not occurred, is the following:
- (a) **The President of the Republic of South Africa:**
- (aa) To take note of the findings in this report in so far as they related to the erstwhile Minister of Finance, Mr Gordhan and to take appropriate disciplinary action against him for failing to uphold the values and principles of public administration entrenched in section 195 of the Constitution, and the duty conferred on Members of the Cabinet in terms section 92(3)(a) of the Constitution, to act in accordance with the Constitution.
- (b) **The Commissioner of SARS:**
- (aa) To set in motion steps to recover the money paid as actuarial deficit or penalty on behalf of Mr Pillay by SARS to GEPI from the erstwhile Commissioner of SARS, Mr Magashula; and
- (bb) To ensure that SARS introduces as part of their recruitment processes, regulations, policies and practices which are clear and unambiguous relating to early retirement and staff retention.



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**REPORT ON AN INVESTIGATION INTO ALLEGATIONS OF MALADMINISTRATION AND IMPROPRIETY IN THE APPROVAL OF MR IVAN PILLAY'S EARLY RETIREMENT WITH FULL PENSION BENEFITS AND SUBSEQUENT RETENTION AT THE SOUTH AFRICAN REVENUE SERVICE (SARS).**

**1. INTRODUCTION**

- 1.1. This is my 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 (the Public Protector Act).
- 1.2. The report is submitted in terms of section 8(3) of the Public Protector Act to the following people to note the outcome of my investigation: -
  - 1.2.1. The President of the Republic of South Africa, his Excellency, Mr Matamela Cyril Ramaphosa;
  - 1.2.2. The Minister of Public Enterprises, Mr Pravin Gordhan, MP;
  - 1.2.3. Mr George Ngakane Virgil (Oupa) Magashula, the erstwhile Commissioner of the South African Revenue Service;
  - 1.2.4. The Commissioner of the South African Revenue Services, Mr Edward Kieswetter;
  - 1.2.5. Mr Visvanathan (Ivan) Pillay, the former Deputy Commissioner of the South African Revenue Service; and to
  - 1.2.6. The Complainant who wishes to remain anonymous.

1.3. Section 7(9) Notices were sent to the following individuals affording them an opportunity to respond to my intended findings: -

1.3.1. The Minister of Public Enterprises, Mr Pravin Gordhan, MP;

1.3.2. Mr Oupa Magashula; and to

1.3.3. Mr Ivan Pillay.

1.4. The report relates to an investigation into allegations maladministration and impropriety by Minister Pravin Gordhan, in his capacity as the erstwhile Minister of Finance, in the approval of Mr Ivan Pillay's (Mr Pillay's) early retirement with full pension benefits and his subsequent retention at the South African Revenue Service (SARS), on the recommendation of the then Commissioner of SARS, Mr Oupa Magashula (Mr Magashula).

## **2. THE COMPLAINT**

2.1. The complaint was lodged anonymously on 18 November 2016 alleging that Minister Gordhan approved, in his capacity as the then Minister of Finance and on the recommendation of Mr Magashula: -

2.1.1. Mr Pillay's application for early retirement and payment of his retirement package;

2.1.2. The further payment by SARS of a penalty in the amount of R1, 141 178, 11, which was levied on Mr Pillay's pension benefits by the Government Employees Pension Fund (the GEPPF), which would allow him to enjoy full pension benefits as though he had retired at a statutory age; and

- 
- 2.1.3. Mr Pillay's subsequent retention as the Deputy Commissioner of SARS on a fixed-term contract basis, following the approval of his early retirement.
- 2.2. It is the Complainant's contention that Messrs Pillay and Magashula as well as Minister Gordhan's conduct amounted to maladministration in that they failed to prevent SARS from incurring irregular, fruitless and wasteful expenditure, and in so doing, violated section 86 read with sections 1, 38 and 39 of the Public Finance Management Act 1 of 1999.
- 2.3. The Complainant also contends that Mr Magashula and Minister Gordhan in essence acted dishonestly with regard to their dealings with public funds which resulted in Mr Pillay receiving an improper advantage or being unjustifiably enriched at the expense of the taxpayer.
- 2.4. The Complainant further contends that the penalty levied by the GEPP and subsequently paid by SARS, in the amount of R1, 141 178, 11 should be recovered from Messrs Pillay and Magashula as well as Minister Gordhan jointly and severally.

### **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 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. In ***Economic Freedom Fighters v Speaker of the National Assembly and Others; Democratic Alliance v Speaker of the National Assembly and Others***<sup>1</sup>, the Constitutional Court per Chief Justice Mogoeng stated the following when confirming the powers of the Public Protector: -

- 3.3.1. Complaints are lodged with the Public Protector to cure incidents of impropriety, prejudice, unlawful enrichment or corruption in government circles;<sup>2</sup>
- 3.3.2. 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;<sup>3</sup>
- 3.3.3. Taking appropriate remedial action is much more significant than making a mere endeavor to address complaints which was the most the Public Protector could do in terms of the Interim Constitution. However sensitive, embarrassing and far-reaching the implications of her report and findings, she is constitutionally empowered to take action that has that effect, if it is the best attempt at curing the root cause of the complaint;<sup>4</sup>

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

<sup>2</sup> Para [65].

<sup>3</sup> Para [67].

<sup>4</sup> Para [68].

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- 3.3.4. 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;<sup>5</sup>
- 3.3.5. 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;<sup>6</sup>
- 3.3.6. 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;<sup>7</sup>
- 3.3.7. Implicit in the words "take action" is that the Public Protector is herself empowered to decide on and determine the appropriate remedial measure. And "action" presupposes, obviously where appropriate, concrete or meaningful steps. Nothing in these words suggests that she necessarily has to leave the exercise of the power to take remedial action to other institutions or that it is power that is by its nature of no consequence;<sup>8</sup>
- 3.3.8. She has the power to determine the appropriate remedy and prescribe the manner of its implementation;<sup>9</sup>

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<sup>5</sup> Para [69].

<sup>6</sup> Para [70].

<sup>7</sup> Para [71].

<sup>8</sup> Para [71(a)].

<sup>9</sup> Para [71(d)].

3.3.9. “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.<sup>10</sup>

3.3.10. The remedial action taken by the Public Protector has a binding effect.<sup>11</sup> The Constitutional Court further held that: *“When remedial action is binding, compliance is not optional, and 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.”*<sup>12</sup>

3.3.11. In the matter of the ***President of the Republic of South Africa v Office of the Public Protector and Others (91139/2016) [2017] ZAGPPHC 747; 2018 (2) SA 100 (GP) ; [2018] 1 All SA 800 (GP); 2018 (5) BCLR 609 (GP) (13 December 2017)***, the court held as follows, when confirming the powers of the Public Protector: -

3.3.11.1. The constitutional power is curtailed in the circumstances wherein there is conflict with the obligations under the constitution;<sup>13</sup>

3.3.11.2. The Public Protector has the power to take remedial action, which include instructing the President to exercise powers entrusted on them under the constitution if that is required to remedy the harm in question;<sup>14</sup>

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<sup>10</sup> Para [71(e)].

<sup>11</sup> Para [76].

<sup>12</sup> *Ibid* para [73].

<sup>13</sup> Para [79].

<sup>14</sup> Para [82].

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3.3.11.3. Taking remedial action is not contingent upon a finding of impropriety or prejudice. Section 182(1) afford the Public Protector with the following three separate powers;<sup>15</sup> -

- a) Conduct an investigation;
- b) Report on that conduct; and
- c) To take remedial action.

3.3.11.4. The Public Protector is constitutionally empowered to take binding remedial action on the basis of preliminary findings or *prima facie* findings;<sup>16</sup>

3.3.11.5. The primary role of the Public Protector is that of an investigator and not an adjudicator. Her role is not to supplant the role and function of the court;<sup>17</sup>

3.3.11.6. The fact that there is no firm findings on the wrong doing, this does not prohibit the public protector from taking remedial action. The Public Protector's observations constitute *prima facie* findings that point to serious misconduct;<sup>18</sup>

3.3.11.7. *Prima facie* evidence which point to serious misconduct is a sufficient and appropriate basis for the Public protector to take remedial action;<sup>19</sup>

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

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<sup>15</sup> Para [100 – 102].

<sup>16</sup> Para [104].

<sup>17</sup> Para [105].

<sup>18</sup> Para [107 – 108].

<sup>19</sup> Para [112].

3.3.12. The Public Protector is further mandated by the Public Protector Act to investigate and redress maladministration and related improprieties in the conduct of state affairs. The Public Protector is also given power to resolve disputes through conciliation, mediation, negotiation or any other appropriate alternative dispute resolution mechanism.

3.3.13. The conduct of Minister Gordhan amounts to conduct in state affairs, and therefore, the matter falls within the ambit of the Public Protector's mandate.

3.4 The Public Protector's power and jurisdiction to investigate and take appropriate remedial action was not disputed by any of the parties.

## **4. THE INVESTIGATION**

### **4.1 Methodology**

4.1.1 The 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.

4.1.3 The investigation process included an exchange of correspondence with Minister Gordhan, SARS, the Government Pensions Administration Agency (GPAA), the Department of Public Service and Administration (DPSA), the Public Service Commission (PSC). Interviews conducted with relevant stakeholders, an analysis of relevant documentation, conducted research, and the consideration and application of relevant laws, regulatory framework and jurisprudence.



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4.1.4 During the investigation process, notices in terms of section 7(9)(a) of the Public Protector Act (section 7(9) notices), dated 30 April 2019 were served on Minister Gordhan and Messrs Magashula and Pillay on 02 May 2019, to afford them an opportunity to respond to my provisional findings. Responses were received from Messrs Magashula and Pillay on 21 May 2019 and from Minister Gordhan on 22 May 2019. The submissions contained in the said responses have been considered and factored in this report.

## **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: -

4.2.1.1 What happened?

4.2.1.2 What should have happened?

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

4.2.1.4 In the event of impropriety or maladministration, what would it take to remedy the wrong or to place the Complainant as close as possible to where they would have been but for the impropriety or maladministration?

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 Minister Pravin Gordhan, in his capacity as the erstwhile

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Minister of Finance, acted irregularly in approving Mr Pillay's early retirement with full pension benefits and his subsequent retention at SARS, on the recommendation of the then Commissioner of SARS, Mr Magashula.

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 Minister Gordhan and Mr Magashula or an organ of state to prevent improper conduct and / or maladministration.

4.2.4 The enquiry regarding the remedy or remedial action seeks to explore options for redressing the consequences of the impropriety and/or maladministration. Where a Complainant has suffered prejudice, the idea is to place him or her as close as possible to where they would have been had the impropriety and/or maladministration not occurred.

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

4.3.1 Whether Minister Gordhan irregularly approved the early retirement of Mr Ivan Pillay with full pension benefits and his subsequent retention at SARS in the same position;

**4.4 The Key Sources of information**

**4.4.1 Documents**

4.4.1.1 Copy of a memorandum from Mr Vlok Symington to the then Commissioner of SARS, Mr Pravin Gordhan, dated 18 March 2009;

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- 4.4.1.2 Copy of a memorandum from Mr Pillay to the then Commissioner of SARS, Mr Magashula and to the then Minister of Finance, Mr Pravin Gordhan, dated 25 August 2009;
  - 4.4.1.3 Copy of email correspondence between Messrs Nic Coetzee and Magashula, dated 08 and 09 October 2009;
  - 4.4.1.4 Copy of a memorandum from Mr Pillay to the then Commissioner of SARS, Mr Magashula and to the then Minister of Finance, Mr Pravin Gordhan, dated 09 October 2009;
  - 4.4.1.5 Copy of a memorandum from Mr Pillay to the then Commissioner of SARS, Mr Magashula, dated 26 November 2009;
  - 4.4.1.6 Copy of a submission from Mr Magashula addressed to Minister Gordhan titled *"Early Retirement of Deputy Commissioner Ivan Pillay With Full Retirement Benefits"*, dated 12 August 2010;
  - 4.4.1.7 Copy of a letter from Ms Elsie Pule, the Chief Officer: Human Resources, addressed to Mr Pillay, titled *"Retirement From The Employment of SARS"*, dated 07 January 2011;
  - 4.4.1.8 Copy of a contract of employment between SARS and Mr Pillay, dated 07 February 2011;
  - 4.4.1.9 Copy of Pensions Administration Withdrawal From Fund Forms, date stamped 20 July 2011;

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- 4.4.1.10 Copy of a contract of employment between SARS and Mr Pillay, dated 26 March 2014;
  - 4.4.1.11 Copy of a legal opinion from Mashiane, Moodley and Monama Inc, dated 05 November 2014;
  - 4.4.1.12 Copy of a legal opinion from Advocate MSM Brassey SC, dated 11 November 2014;
  - 4.4.1.13 Copy of an affidavit deposed to by Mr Vlok Symington, dated 20 October 2016;
  - 4.4.1.14 Copy of the complaint with annexures, dated 18 November 2016;
  - 4.4.1.15 Correspondence to Minister Gordhan, dated 12 February 2018;
  - 4.4.1.16 Copy of an affidavit deposed to by Ms Minee Suzanne Hendricks, dated 20 June 2018;
  - 4.4.1.17 Subpoena to Minister Gordhan, dated 01 October 2018;
  - 4.4.1.18 Subpoena to Mr Krishen Sukdev, the Chief Executive Officer of GPAA (Mr Sukdev), dated 01 October 2018;
  - 4.4.1.19 Subpoena to Mr Mark Kingon, the former Acting Commissioner of SARS, dated 01 October 2018;
  - 4.4.1.20 Copy of a letter from Mr Sukdev to the office of the Public Protector, dated 16 October 2018

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- 4.4.1.21 Correspondence to Advocate Richard Sizani, the Chairperson of the Public Service Commission, dated 22 November 2018;
  - 4.4.1.22 Correspondence to Mr Sukdev, dated 23 November 2018;
  - 4.4.1.23 Correspondence to Professor Richard Levin, the Director-General of the Department of Public Service and Administration, dated 23 November 2018;
  - 4.4.1.24 Copy of a letter from Advocate Richard Sizani, the Chairperson of the Public Service Commission, dated 01 February 2019;
  - 4.4.1.25 Subpoena to Ms Minee Suzanne Hendricks, dated 05 March 2019;
  - 4.4.1.26 Subpoena to Mr Pillay, dated 05 March 2019;
  - 4.4.1.27 Subpoena to Mr Nic Coetzee, dated 05 March 2019;
  - 4.4.1.28 Subpoena to Mr Magashula, dated 05 March 2019;
  - 4.4.1.29 Subpoena to Mr Vlok Symington, dated 05 March 2019;
  - 4.4.1.30 Copy of an affidavit with annexures, deposed to by Mr Magashula, dated 20 March 2019;
  - 4.4.1.31 Copy of a supplementary affidavit with annexures, deposed to by Mr Magashula, dated 25 March 2019;
  - 4.4.1.32 Email correspondence between the Office of the Public Protector and Ms Keshini Michaels in the office of the Commissioner of SARS, dated 26 March 2019;

4.4.1.33 Subpoena to Professor Richard Levin, the Director-General of the Department of Public Service and Administration, dated 11 April 2019;

4.4.1.34 Subpoena to Mr Kenny Govender, the Deputy Director-General of the Department of International Relations and Cooperation, dated 11 April 2019;

**4.4.2 Notices issued in terms of section 7(9) of the Public Protector Act, 1994 to:**

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4.4.2.1 The Minister of Public Enterprises, the Hon Mr Pravin Gordhan, MP, dated 30 April 2019;

4.4.2.2 Mr Visvanathan (Ivan) Pillay, the former Deputy Commissioner of the South African Revenue Service, dated 30 April 2019; and to

4.4.2.3 Mr George Ngakane Virgil (Oupa) Magashula, the erstwhile Commissioner of the South African Revenue Service, dated 30 April 2019.

**4.4.3 Response to the notice in terms of section 7(9) of the Public Protector Act, 1994, from: -**

4.4.3.1 Mr Visvanathan (Ivan) Pillay, the former Deputy Commissioner of the South African Revenue Service, dated 21 May 2019;

4.4.3.2 Mr George Ngakane Virgil (Oupa) Magashula, the erstwhile Commissioner of the South African Revenue Service received on 21 May 2019; and

4.4.3.3 The Minister of Public Enterprises, the Hon Mr Pravin Gordhan, MP, dated 22 May 2019.

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#### **4.4.4 Interviews, meetings and *in loco* inspections**

- 4.4.4.1 Interview conducted with Minister Gordhan on 14 November 2018;
- 4.4.4.2 Interview conducted with Mr Pillay on 25 March 2019;
- 4.4.4.3 Interview conducted with Mr Vlok Symington on 25 March 2019;
- 4.4.4.4 Interview conducted with Ms Minee Suzanne Hendricks on 25 March 2019;
- 4.4.4.5 Interview conducted with Mr Nic Coetzee on 25 March 2019;
- 4.4.4.6 Interview conducted with Mr Magashula on 25 March 2019;

#### **4.4.5 Legislation and other prescripts**

- 4.4.5.1 *The Constitution of the Republic of South Africa, 1996;*
- 4.4.5.2 *The Public Protector Act, 23 of 1994;*
- 4.4.5.3 *The South African Revenue Service Act, 1997;*
- 4.4.5.4 *The Public Service Act, 1994;*
- 4.4.5.5 *The Government Employees Pension Law, 1996;*
- 4.4.5.6 *The Public Finance Management Act, 1999;*



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#### 4.4.6 Case Law

- 4.4.6.1 *Cool Ideas 1186 CC v Hubbard and Another* 2014 (4) SA 474 (CC) 484;
- 4.4.6.2 *Ity Capital SA Property Holdings LTD v Chavonnes Badenhorst St Clair Cooper and others* 2018(4) SA 71 (SCA);
- 4.4.6.3 *Fedsure Life Assurance Ltd and Others v Greater Johannesburg Transitional metropolitan Council and Others* 1999(1) SA 374 (CC);
- 4.4.6.4 *Minister of Public Works and Others v Kyalami Ridge Environmental Association and Another (Mukhwevho Intervening)* 2001 (3) SA 1151 (CC);
- 4.4.6.5 *Affordable Medicines Trust and Others v Minister of Health and Others* 2006 (3) SA 247 (CC);
- 4.4.6.6 *Khumalo and Another v Member of the Executive Council for Education: KwaZulu-Natal* 2014 (3) BCLR 333 (CC).

#### 4.4.7 Books

- 4.4.8.1 Oxford South African Concise Dictionary.

### 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 Minister Gordhan irregularly approved the early retirement of Mr Ivan Pillay with full pension benefits and his subsequent retention at SARS in the same position: -



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Issues that are common cause

- 5.1.1 It is common cause that during October 2010, Minister Pravin Gordhan, MP (Minister Gordhan) approved in his capacity as the erstwhile Minister of Finance, Mr Ivan Pillay's (Mr Pillay) early retirement with full pension benefits and immediate retention as Deputy Commissioner of the South African Revenue Service (SARS) on the recommendation of the erstwhile Commissioner of SARS, Mr George Ngakane Virgil Magashula (Mr Magashula).

Issues that are in dispute

- 5.1.2 The issue for my determination is whether Minister Gordhan acted irregularly when he approved the early retirement of Mr Pillay with full pension benefits and his subsequent retention as Deputy Commissioner at SARS.
- 5.1.3 During the course of the investigation I received an internal memorandum from Mr Vlok Symington (Mr Symington) and addressed to the Commissioner of SARS who was at the time Mr Magashula, dated 18 March 2009, advising him of Mr Pillay's application for early retirement from the GEPF; his application to Minister Gordhan to waive the early retirement penalty; and his request to be appointed at SARS on a contract basis after his retirement from the GEPF. In the memorandum, Mr Symington stated the following: -

*"Approached individually, all three elements are technically possible under the rules of the GEPF read together with the employment policies of SARS. Mr Pillay has reached the required age for early retirement, he is entitled*

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*to request the Minister to “waive” the early retirement penalty, and no technicality prevents SARS from appointing him on a contract basis after his retirement from the GEPF.”*

5.1.4 Between August and November 2009, Mr Pillay, who was at the time the Deputy Commissioner of SARS addressed a written memorandum to the Commissioner (Mr Magashula) and to Minister Gordhan informing them of his intention to take early retirement and requesting that Mr Magashula approve his re-appointment at SARS on a contract basis; and that he also consider recommending that Minister Gordhan approve that the penalty on his pension benefits be paid to the GEPF on his behalf by the employer (SARS).

5.1.5 In the memorandum, Mr Pillay states *inter alia*, the following: -

*“The third matter is slightly more technical and complicated and it concerns my early retirement benefits payable from the GEPF. Although the rules of the GEPF provides that a member of the GEPF can elect to retire from the age of 55 years and onwards, there is a penalty payable in terms of the benefits. The specific Rules in this regard determines that both the lump sum and monthly pension will be reduced by 0.30% for each month before an early retiree reaches the age of 60 years. As I intend to take early retirement at age 56 years (48 months before reaching the age of 60 years), my pension benefits will be reduced by 14.4%. Section 16 (6) of the Public Service Act (which still applies to SARS) was amended to provide that where early retirement is applied for, Ministers can approve that employers (departments/SARS) pay the penalties imposed on early retirees in terms of the GEPF rules.*

*In view of this it will be appreciated if you could recommend to the Minister that SARS pay to the GEPF my early retirement GEPF penalties. It is estimated that the penalties will amount to R1 064 257."*

5.1.6 On 08 October 2009 Ms Tania Kirby sent e-mail correspondence to Mr Nic Coetzee (Mr Coetzee) on behalf of Mr Magashula stating the following: -

*"Kindly have a look at the attached memo addressed to me by Ivan my deputy. I would like for you to provide me with a comprehensive summary on:*

- 1. your view on if this is allowed*
- 2. What criteria will the Minister use to apply hi mind and consider such cases....."*

5.1.7 Mr Coetzee responded to Mr Magashula's enquiry in e-mail correspondence, dated 08 October 2009, stating that: -

*"Hi Oupa*

*Luckily for me I have dealt with matter during June this year but I do not know why the matter was not promoted at the time as I have certainly started the process. I have amended the two submissions (attached) to fit in with Mr Pillay's retirement in a contract capacity. What may raise some eyebrows in this particular case is that the employee is appointed to the same position. It is not unusual that a retired employee to be re-appointed after retirement in a contract capacity. Ordinarily such a re-appointment would be to a different and a lower-graded position"; it will have to be decided if satisfactory reasons can be given for the re-appointment in the same position. We had two similar applications for early retirement, both*

*which were not approved by the Minister as the Minister could not find sufficient reasons to approve early retirement. In terms of section 16(6) of the Public Service Act, the Minister only has (sic) consider if SUFFICIENT REASON exists to approve Mr Pillay's early retirement. I trust that the above comments plus the two submissions contain enough information for you to engage the Minister on this matter.*

*Thanks Nic"*

- 5.1.8 In further e-mail correspondence to Mr Magashula, dated 09 October 2009, Mr Coetzee stated that: -

*"Hi Oupa*

*I am resending this e-mail on account of a slight change I have made to the two attached documents. The changes indicates the reason why Mr Pillay is requesting approval for early retirement is to provide for his children's education and not as I have previously stated that he wished to pursue other interests. You will now have to consider to recommend and the Minister consider to approve if this is SUFFICIENT REASON to recommend/ approve Mr Pillay's application for early retirement. If his application is duly recommended / approved, it could technically be construed that SARS is willing to contribute from its budget an amount of +- R340 000 towards the education of his children. I admit it is a rather cynical viewpoint, but it can be a viewpoint that may be held by other parties as well and that may put yourself and the Minister in a tight spot, especially because Mr Pillay was re-appointed in his present position. The argument may be that he was able to continue with his present functions, but his early retirement and reappointment was purely to assist him to be*

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*able to provide for his children's education, with a R340 000 "contribution" from SARS.*

*Thanks*

*Nic"*

- 5.1.9 On or about 12 August 2010, Mr Magashula addressed a formal motivation to Minister Gordhan in which he was requested to approve the early retirement of Mr Pillay as Deputy Commissioner of SARS *"with full retirement benefits from the GEPP as contemplated in Rule 14.3.3(b) of the Government Employees Pension Law, 1996, read with section 19 of the SARS Act and section 16(2A)(a) of the Public Service Act, 1994, as amended, with effect from 1 September 2010."*
- 5.1.10 In addition, Mr Magashula requested Minister Gordhan's approval to retain Mr Pillay as Deputy Commissioner of SARS on a three-year contract with effect from 01 September 2010.
- 5.1.11 This motivation also states that in the past five (05) years, the GEPP had approved over 3000 requests from various government departments for employees to retire before the age of sixty (60) years, with full pension benefits and in addition, the former and current Minister of Finance (Minister Gordhan) had approved about five (05) of such requests over the past two (02) years.<sup>20</sup>

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<sup>20</sup> The motivation referred to an Appendix A and B. Despite requests forwarded to SARS, Minister Gordhan and Mr Magashula, copies of these annexures could not be obtained for analysis.

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- 5.1.12 The motivation further states that there is precedent for the termination of employment and immediate rehiring of the same person under different conditions of employment within the public sector.
- 5.1.13 The motivation also states that advice was sought from the Acting Director-General of the Department of Public Service and Administration (DPSA), Mr Kenny Govender regarding the proposed early retirement of Mr Pillay and his retention on a three (03) year contract. According to the motivation, Mr Govender confirmed that there is no restriction on the appointment to the public service or the same department of a person who has left on an Employee Initiated Severance Package and that he was aware of previous such cases.
- 5.1.14 The motivation further states that the financial implications for SARS, should approval be granted to allow Mr Pillay to take early retirement with full retirement benefits, will be an amount of R1 258 345.99 which SARS would be liable to pay to the GEPP in terms of the provisions of section 17(4) of the GEPP Law, 1996.
- 5.1.15 The evidence indicates that Minister Gordhan approved Mr Magashula's recommendation contained in the motivation, dated 12 August 2010, by appending his signature on the document on or about 18 October 2010.
- 5.1.16 It is pertinent to emphasise at this point that although Mr Pillay's request for early retirement was made in terms of section 16(6)(a) and (b) of the Public Service Act, 1994, Mr Magashula's motivation and recommendation to Minister Gordhan on the one hand, and Minister Gordhan's approval of the recommendation, on the other hand, were made expressly in terms of a different section of the Public Service Act, 1994, being section 16(2A).

5.1.17 On or about 07 January 2011, Ms Elsie Pule, the then Chief Officer: Human Resources addressed a letter to Mr Pillay in which she stated, *inter alia*, the following: -

*"As you have indicated that you wish to take early retirement from the employment of SARS in terms of the provisions of section 19 (1)(b) of the South African Revenue Service Act (Act No.34 of 1997, as amended), read with Sections 8(1)(a)(i), 16 (2)(2A)(a) and 16(6)(a) and (b) of the Public Service Act, 1994 (Act No.103 of 1994, as amended), it is confirmed that approval has been granted for you to retire from the employment of SARS on 31 December 2010."*

5.1.18 In order to regularize the retention of Mr Pillay, on or about 07 February 2011, he entered into a written fixed-term contract of employment with SARS for a period of five (05) years, commencing on 01 January 2011 and terminating on 31 December 2015.

5.1.19 On or about 26 March 2014, Mr Pillay and SARS entered into a further written fixed-term contract of employment for a period of four (04) years, commencing on 01 April 2014 and terminating on 31 December 2018.

5.1.20 I received and reviewed the withdrawal forms from the fund, dated-stamped 20 July 2011, which were submitted to GEPI and noted that the reason for Mr Pillay's termination of service is early retirement in terms of Rule 14.3.1 of the GEPI Law.

5.1.21 A letter from Mr Krishen Sukdev (Mr Sukdev), the Chief Executive Officer of the Government Pensions Administration Agency (GPAA), dated 16 October 2018 stated the following: -

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*"In the case of Mr Pillay, the records of the GPAA indicate that such early retirement was approved by the Executive Authority and accordingly such early retirement was with full benefits. The additional liability payable to the Fund (GEPF) was recovered from the employer (SARS). The pension claim documents received in the case of Mr Pillay confirmed the mode of exit as early retirement with full benefits as recommended by the employer and approved by the Executive Authority as allowed and provided for in terms of section 16(6) of the Public Service Act."*

5.1.22 I engaged GPAA again in correspondence dated 23 November 2018 to establish if similar applications for early retirement with full pension benefits had been processed in the last three (03) financial years. The purpose was to establish the prevalence of this practice in the public service.

5.1.23 In a response letter, dated 12 December 2018, Mr Sukdev stated the following: -

*"...in the last three financial years there has been a number of instances where employees were allowed to go on early retirement. The records of already finalised pension benefit payments are stored off site and will it only (sic) be possible to provide all details in this regard in the new year. In an attempt to assist we attached hereto 4 examples of such cases of senior officials which were processed over the last three years from which you will note that approval was granted for the officials concerned to go on early retirement...which resulted in additional liabilities being payable to the fund."*



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- 5.1.24 I reviewed the examples provided by GPAA and noted the instances where people in the public service have been allowed to go on early retirement without incurring the additional liability incurred from the GEPP.
- 5.1.25 Reasons for the request for early retirement in these examples included affording lower ranked officials an opportunity to apply for and occupy the senior position left vacant by the early retiree; various health reasons and dependence on chronic medication and treatment of the early retiree and the death of family members.
- 5.1.26 I also engaged the Public Service Commission (PSC) in correspondence dated 22 November 2018 and 23 January 2019 to establish if the PSC was aware of similar applications for early retirement with full pension benefits being processed in the last three (03) financial years.
- 5.1.27 In a response letter dated 01 February 2019, Advocate Richard Sizani, the Chairperson of the PSC stated that: -

*“... the Public Service Commission had three employees that had taken early retirement in the last three years. Of these, one employee retired in the 2015/16 financial year with full pension benefits wherein the Public Service Commission carried the liability. In respect of the other two employees, the employees retired with full pension benefits in the 2016/17 and 2017/18 financial years, but the employees carried the liability due to the fact that the PSC did not have sufficient funding to cover the liability.”*

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### **Evidence adduced by Minister Gordhan**

- 5.1.28 I conducted an interview with Minister Gordhan on 14 November 2018, who was assisted by his legal team.
- 5.1.29 During the said interview, Minister Gordhan confirmed that he would be required to respond to three issues concerning the investigation, which were in essence, whether early retirement was permissible in the public service; secondly, whether the payment of the actuarial deficit or shortfall by SARS arising from the above was permissible; and lastly, whether an individual can be retained on a contract basis for a specific role to be defined.
- 5.1.30 It is trite that on or about 18 October 2009, Minister Gordhan approved a formal motivation from Mr Magashula, dated 12 August 2010, which contained terms which are again restated herein for convenience: -

*“It is recommended that the Minister approve Mr Pillay’s early retirement from SARS with effect from 1 August 2010 without downscaling of his retirement / pension benefits as provided for in GEPP Rule 14.3.3 as well as section 19 of the SARS Act, 1997, as amended, read with section 16(2)(a) of the Public Service Act, 1994, as amended.*

*In addition it is recommended that the Minister approved the retention of Mr Pillay as Deputy Commissioner of SARS on a three year contract with effect from 1 August 2010. The remuneration of Mr Pillay in terms of the contract will be at the same cost to company as his current package.”*

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- 5.1.31 Minister Gordhan in essence stated that the three events in this transaction, namely the early retirement, the payment of the actuarial shortfall or deficit and the retention of Mr Pillay, by SARS on a contractual basis were permitted by law.
- 5.1.32 Minister Gordhan indicated that upon receiving the motivation from Mr Magashula, he proceeded to obtain different forms of legal and other advice from diverse sources to ensure that the advice he had received was based on sound interpretation of law. He had applied his mind to the advice given and approved the motivation once he was satisfied.
- 5.1.33 Minister Gordhan stated that he had several discussions pertaining to this issue with Mr Magashula. He further consulted with a Deputy Director-General by the name of Mr Andrew Donaldson (Mr Donaldson) from National Treasury, who had vast experience in pension related matters.
- 5.1.34 He had sought a legal opinion from Mr Vlok Symington (Mr Symington) who he alleges is a pension and Pay As You Earn (PAYE) Tax expert within SARS. Mr Symington's legal opinion indicated that *"GEPF conditions relating to the early retirement as well as the fact that the SARS Act did not preclude the re-hiring of Mr Pillay thereafter."*
- 5.1.35 He requested Ms Minee Suzanne Hendricks (Ms Hendricks) to discuss the matter with one Ms Rebecca Tee (Ms Tee), a Legal Advisor at National Treasury. Ms Tee had indicated that such a request was within the framework of the law and that he (Minister Gordhan) had to consider such request based on the reasons provided by the employee to consider such early retirement and if granted, the employer would cover the actuarial deficit or shortfall for the early retirement from the GEPF.

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- 5.1.36 He discussed the matter with one Mr Kenny Govender, an expert in the Department of Public Service and Administration (DPSA) to understand how the Public Service Act, 1994 (Public Service Act) and the Government Employees Pension Law, 1996 (GEPF Law) and its rules applied. Based on the advice received from these sources, an updated memorandum reflecting the outcomes of the discussions with the DPSA were submitted by SARS to the Ministry of Finance for consideration. He had also been informed by the DPSA during the course of his enquiries and prior to signing and approving the early retirement of Mr Pillay, that there was precedent in that regard.
- 5.1.37 He also sought the advice of Mr Michael Olivier (Mr Olivier), who at the time was the Chairperson of the Remuneration Committee at SARS. The role of this committee is to advise the Minister on remuneration and rewards strategy and other employment conditions. Mr Olivier had a good reputation in both the corporate sector and in some parts of the public sector as well. During a telephone conversation with Mr Olivier they had discussed, *inter alia*, the importance of retaining the services of Mr Pillay. Minister Gordhan stated further that the HR Committee had frequent interactions with the top executive and they understood the strengths and weaknesses or shortcomings of the team as a whole and he recommended that everything possible should be done to retain the services of Mr Pillay.
- 5.1.38 Minister Gordhan stated that the process of enquiry had taken approximately three (03) months of consideration which indicates that this was not a quick application of the mind but vigorous checks of the law and the various experiences had been considered. Taking into consideration the information at his disposal, he subsequently approved the request.

5.1.39 With regard to the payment of the actuarial deficit or shortfall, Minister Gordhan stated that there are two routes to early retirement. *“Voluntary retirement where one third of a percent is deducted for each year short of sixty (60) and you must then settle for whatever the calculation is.... route B is where your Executive Authority gives consent to early retirement and then everything else kicks in automatically.”*

5.1.40 Minister Gordhan also stated that: -

*“...I am informed that if you read chapter five (05) of the Public Service Act, section 16(1)(a), read with section 16(2A)(a), it permits the retirement of a person between the age of fifty-five (55) and sixty-five (65)....then we move to section 16(6)(a) where the Executive Authority approves retirement before the age of sixty (60). That then kicks into section 16(6) which allows for the deeming provision if read with 16(4) as if retirement happened at the age of sixty (60)...Rule 14(3) I am told in terms of the GEPF pension law and its rules which determines what the benefits are, and that then, because this is a defined benefit fund, it then results in what I’ve been referring to as an actuarial shortfall...then in terms of rule 20, which flows from section 17(4) of the GEPF Law, the employer / government pays for the actuarial shortfall...so its automatic, if you can call it that.”*

5.1.41 Section 16(6) of the Public Service Act in essence provides that an Executive Authority may, at the request of an employee, allow him or her to retire from the Public Service before the age of sixty (60) if **sufficient reasons exists** for the retirement.

5.1.42 Minister Gordhan was interviewed on the steps he took to satisfy himself that the reasons provided for the early retirement of Mr Pillay were sufficient. He indicated that he had considered the circumstances on one hand and the law on the other. So in the first instance he had to check whether the law permitted it and in the second instance, Mr Pillay's personal circumstances. Mr Pillay had particular financial needs at that point in time and his health condition (back problems) were part of the Minister's considerations. His financial situation included the education of his children.

5.1.43 Minister Gordhan stated that the reasons behind the motivation to retain Mr Pillay on a contract basis was that he was one of the longest serving employees on the SARS management team. He had gained certain expertise and institutional knowledge of SARS. Minister Gordhan stated further that: -

*"... when we got to SARS in about 98, its enforcement capability was very weak. We learned from the Swedes at the time that any efficient tax authority or custom authority has two, according to their experience, two primary elements to the compliance strategy, which is service and enforcement.... if you do not have the enforcement capability or you do not educate people adequately about their obligations, then you do not get payments.... he (Mr Pillay) was quite an important part of building the enforcement capability.*

*...there is expertise, there is experience and there is leadership in most of these institutions and I think if you go through your recording I indicated to your earlier the compliance model. The lack of enforcement capability in SARS historically and the key role that he played given his previous*

*experience in the struggle against apartheid and elsewhere. In firstly building up our capacity but secondly, benchmarking what we were doing in SARS against international experience. For example, he led as I recall now a team of people who benchmarked the development of a large business centre around that time with the British, Australians, Canadians...it was on that basis that we created a large business centre as a dedicated facility for large corporates in South Africa.*

*...and if you look at the annual reports of the revenue services over that period, you will see lots of examples and reports of the achievements on the enforcement side, but enforcement also covered setting up an audit capability which existed in a marginal sense before. Today it is quite an important part.”*

- 5.1.44 In response to the question whether similar applications had been approved in the public service, Minister Gordhan stated that his predecessor when he was the Commissioner of SARS, Mr Trevor van Heerden (Mr van Heerden) was a very well-known expert in VAT amongst other aspects of Tax law. When Mr van Heerden fell ill, he (Minister Gordhan) had taken over as Commissioner but when his health improved; his services were retained for a number of years.
- 5.1.45 Minister Gordhan also provided the case of Mr Kosie Louw (Mr Louw), a tax lawyer. Mr Louw had retired at the age of 65 years but had been asked to stay on for a period of time until he decided to leave SARS for personal reasons.
- 5.1.46 Minister Gordhan confirmed that he knew Mr Pillay from their struggle days during the apartheid era but rejected that it had influenced or affected his decision to approve the recommendation for the early retirement of Mr

Pillay, the payment of the actuarial shortfall or deficit arising therefrom and the subsequent retention of Mr Pillay on a contract basis.

- 5.1.47 Minister Gordhan was interviewed on the process to be followed in the appointment of a Deputy Commissioner and whether SARS had a retention policy regulating retentions in light of his approval of the recommendation contained in paragraph one of the motivation stating that:
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*"In addition, approval is requested to retain Mr Pillay as Deputy Commissioner of SARS on a three year contract with effect from 1 September 2010."*

- 5.1.48 Minister Gordhan stated that: -

*"You normally went through the usual advertisements et cetera et cetera. So he already had been through that process. This was a question of extending that same position but through a different route."*

*"This is a contractual arrangement as I understand it and that is what we checked with the various legal and administrative people."*

*"That you are and there are [indistinct] I think indicated to you from Mr Govender of [indistinct] for that to actually happen. So this was not a permanent appointment. This was a contractual arrangement between SARS and Mr Pillay."*

- 5.1.49 In response to the question whether he was provided with any documents or policy indicating that he was empowered to approve the retention of Mr



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Pillay as Deputy Commissioner of SARS, he responded in the following terms: -

*"I was informed that it is normal practise or it is not unusual practise, let me put it that way for people to leave the public service and then to be retained on whatever basis.*

*... Any decent organisation, I am sure yours as well would have a retention policy and retention policy is sometimes a practise, sometimes it is [indistinct] for example you about to retire and ma'am next to you must be trained or [indistinct] so that she can take over from you. Or you have three people waiting and then they go through the process of selection to determine who will take your place. So most leaders in the private sector and public sector would make arrangements particularly at a senior level to ensure that there is some retention policy. But there is also with retention policy the question of mentoring. The question of training, the question of exposure and the question of development."*

#### **Evidence adduced by Mr Ivan Pillay**

- 5.1.50 An interview was conducted with Mr Pillay on 25 March 2019, who was assisted by his legal team.
- 5.1.51 Mr Pillay stated that he was appointed at SARS as a General Manager: Special Investigations, during April 1999 to head its Enforcement Unit.
- 5.1.52 At the time of making his request for early retirement, during the year 2009, he had been appointed as the Chief Officer of Enforcement and also held the title of Deputy-Commissioner of SARS.

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- 5.1.53 Mr Pillay related his reasons for his request for early retirement and retention on a contractual basis. He indicated that; (1) he wanted to access his pension but to continue working at SARS in a less stressful environment; (2) SARS was a stressful environment and they worked very long hours; (3) his health had deteriorated; and (4) his family at that stage wanted to go to Holland for the education of his children. He wanted a flexible solution that would enable him to work in a role that is less stressful and have more time to visit his family from time to time.
- 5.1.54 He stated that the whole executive of his division knew about his intentions for early retirement as he had discussed this issue with them. He had also discussed the issue with Human Resources and Mr Vlok Symington and had obtained the advice that should the employer agree to his early retirement, there would be an obligation on the employer to pay the actuarial shortfall.
- 5.1.55 Mr Pillay confirmed that following the approval of the submission recommending his early retirement, payment of the actuarial shortfall and retention at SARS, he had entered into a fixed-term contract with SARS on 07 February 2011, the commencement date being 01 January 2011.
- 5.1.56 Mr Pillay also confirmed that the actuarial shortfall that would be paid to the GEPPF was approximately R1 292 732.
- 5.1.57 Mr Pillay also confirmed that he entered into a second fixed-term contract with SARS on 26 March 2014, the commencement date being 01 April 2014.

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- 5.1.58 Mr Pillay stated that prior to the fixed-term contracts; he had been responsible for Enforcement, with approximately 3800 people in his division.
- 5.1.59 After his “*resignation*” at SARS he retained his title as Deputy-Commissioner of SARS and worked in the Risk, Strategy, Planning and Enablement role with a reduced compliment of staff reporting to him, the number was approximately 600 employees. The Enforcement Division was subsequently placed under Mr Gene Ravele. The Enforcement Division had been the most stressful as it was part of the delivery part of the institution.
- 5.1.60 Mr Pillay confirmed further that he had met Minister Gordhan during the struggle against apartheid around the year 1971 or 1972. They were not friends as they had never visited each other’s homes, but he considered Minister Gordhan a comrade.
- 5.1.61 Mr Pillay also stated that his request to Mr Magashula was not unique to him as he had been advised by Mr Magashula that about 4000 other employees in the public service had made a similar request and received a similar resolution.

**Evidence adduced by Mr Oupa Magashula**

- 5.1.62 An interview was conducted with Mr Magashula on 25 March 2019, who was assisted by his legal team.
- 5.1.63 Mr Magashula stated that he was appointed as Acting Commissioner of SARS during the year 2009 and as Commissioner during August 2009. Minister Gordhan was at the time the Minister of Finance.

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- 5.1.64 He stated that during the course of the year 2009, he was approached by Mr Pillay, who was at the time the Deputy Commissioner, on the prospect of his possible early retirement from SARS. Mr Pillay had explained to him that his health deteriorated as a result of the work pressure. Furthermore, Mr Pillay had explained to him that his wife and children were to relocate to the Netherlands. His wife was of Dutch origin and had wanted her children to be educated in the Netherlands.
- 5.1.65 Mr Pillay had indicated to him that he was anxious to terminate his permanent employment with SARS and would consider resuming his employment with SARS on a contract basis which would be terminable by either party on one month's notice, irrespective of the length of the contract.
- 5.1.66 Mr Pillay was 56 years of age when he approached Mr Magashula.
- 5.1.67 Mr Magashula stated that at the time he had been approached by Mr Pillay, he had just been appointed as Commissioner of SARS. Mr Pillay was the only Deputy-Commissioner at SARS and he could not afford to lose him or leave the position vacant as that would have debilitated SARS.
- 5.1.68 Mr Magashula referred to the leadership competency model review accompanied by what is termed the Goodness of Fit, conducted by SARS during the year 2008, which confirmed the value that Mr Pillay brought to SARS, hence the desire to retain his employment at SARS as Deputy Commissioner on a contractual basis following his early retirement.
- 5.1.69 Mr Magashula further indicated that the Goodness of Fit assessment was conducted by the Hay Group on Mr Pillay and other five (05) other SARS

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Exco members to determine their “*Succession Fit*” for the position of SARS Commissioner. The ECXO members who were assessed in terms of the “*Goodness of Fit*” were; Messrs. Magashula; Barry Hore; Edward Kieswetter, Kosie Louw and Gene Ravele.

5.1.70 Mr Pillay is said to have been the one who came out as highly ranked of all the six (06) EXCO members assessed in terms of most of the leadership competencies under the SARS “*Leadership Model*”.

5.1.71 According to Mr Magashula, despite not being in possession of a degree, Mr Pillay fully met the requirements for the position of the SARS Commissioner.

5.1.72 Mr Magashula corroborated Minister Gordhan evidence that they had discussed the issue of Mr Pillay’s early retirement. Minister Gordhan had indicated to him that he would consider Mr Pillay’s request if he was convinced that it was legally plausible and permissible for him to take such a decision. Minister Gordhan had also referred him to the advice he had obtained from Mr Symington.

5.1.73 Mr Magashula stated that during October 2009, he had obtained the advice of Mr Nic Coetzee, who was one of the Human Resources officials at SARS as well as that of Mr Symington.

5.1.74 Mr Magashula stated that he had been advised that: -

*“In terms of the provisions of the Public Service Act of 1994 (as amended), and the rules of the Fund, Mr Ivan Pillay could be granted permission to go on early retirement but due to the fact that he was not 60 years of age yet, he required the Minister of Finance’s approval and if the Minister was*

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*satisfied, in his own discretion, that good reasons exist for his early retirement. This is provided for in section 16 of the said Act, which also has a deeming provision that places an obligation on the Department i.e. SARS, to pay to the Pension Fund the so-called penalty contribution for allowing early retirement to a person beyond 55 years of age but younger than 60 years.”*

5.1.75 Following the advice he had received, Mr Magashula then requested Mr Pillay to put his request in writing and to set out his reasons for Minister Gordhan to consider. Mr Pillay did so on 27 November 2009.

5.1.76 Mr Magashula then forwarded his request and recommendation to Minister Gordhan on 12 August 2010 who then approved the submission on 18 October 2010.

5.1.77 Mr Magashula also stated that: -

*“...in the light of Mr Pillay’s contribution to SARS, the high standard of his leadership and the quality of his management as Deputy Commissioner, coupled with his personal circumstances which he explained to me and the Minister, every single step regarding his early retirement was well considered in a process that took in excess of one year to complete. Nothing unlawful was done and I was told that at the time a few thousand people, who had served in the public service, retired in the very same way with the approval of the various Ministers.... neither I, nor the Minister, nor any other person involved in this process did anything untoward or unlawful in whatsoever manner.”*

5.1.78 Mr Magashula stated that in the past two (02) years, Minister Gordhan had approved five (05) requests similar to that of Mr Pillay i.e. the approval of

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early retirement with full pension benefits. He however did not provide proof in that regard. Mr Magashula stated that he had requested National Treasury to provide the five motivations, but they had not been provided at the time of the interview.

5.1.79 Mr Magashula also stated that he had received email correspondence from Mr Kenny Govender, which indicated that 3000 employees in the public service had retired with full retirement benefits and subsequently re-appointed to the same position, in similar circumstances as Mr Pillay. Mr Magashula could however, not furnish us with a copy of that email correspondence for consideration.

5.1.80 Mr Magashula conceded that Mr Pillay continued to work after submitting the formal request on or about 12 August 2010, recommending Mr Pillay's early retirement with full pension benefits, which was approved by Minister Gordhan on or about 20 October 2010.

5.1.81 He also conceded that between 20 October 2010 and 07 February 2011, when Mr Pillay entered into a fixed-term contract with SARS, there had been no break in the employment service and relationship. He had continued to work for SARS.

5.1.82 Mr Magashula stated that the terms and conditions of Mr Pillay's employment contract had remained the same after his retention on a fixed-term basis, during February 2010.

5.1.83 Mr Magashula echoed the sentiments of Mr Pillay that following his early retirement and retention in February 2011, he retained his title as Deputy-Commissioner but had his responsibilities reduced and allocated to other

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SARS employees who reported to him, which included the Audit, Enforcement and Customs operations.

**Evidence adduced by Mr Vlok Symington**

- 5.1.84 An interview was conducted with Mr Symington on 25 March 2019, who was assisted by his legal team.
- 5.1.85 Mr Symington stated that he joined SARS during 1990 and since that time, he has been working on matters related to pension funds, provident funds and retirement annuity funds.
- 5.1.86 Mr Symington stated that Minister Gordhan had approached him, in his capacity as Commissioner of SARS during the year 2009, for his opinion on Mr Pillay's application for early retirement from the GEPF, his application for the Minister to waive the early retirement penalty and his request for retention on a contractual basis after retirement from the GEPF.
- 5.1.87 Mr Symington had as a result, prepared the internal memorandum, dated 18 March 2009. This memorandum has already been referred to elsewhere in this correspondence but is restated herein for convenience. In the memorandum, Mr Symington stated the following: -

*"Approached individually, all three elements are technically possible under the rules of the GEPF read together with the employment policies of SARS. Mr Pillay has reached the required age for early retirement, he is entitled to request the Minister to "waive" the early retirement penalty, and no technicality prevents SARS from appointing him on a contract basis after his retirement from the GEPF."*



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- 5.1.88 Mr Symington introduced into evidence the affidavit which he prepared for the Nugent Commission of Inquiry into Tax Administration and Governance by SARS (Nugent Commission), dated 20 October 2016.
- 5.1.89 Mr Symington in essence stated that Mr Pillay had reached the required age for early retirement and had a right in law to apply for early retirement.
- 5.1.90 He stated further that once the early retirement was approved by Minister Gordhan (the Executive Authority), section 16(4) of the Public Service Act became applicable, the effect of which was that Mr Pillay was deemed to be at the age of 60 years as far as the rules of the GEPP are concerned and therefore his pension benefit was not subject to any penalty.
- 5.1.91 Mr Symington stated that if as a result of the application of section 16(6), read with section 16(4) of the Public Service Act, the GEPP incurs an additional financial obligation or actuarial shortfall that shall be covered by the employer.
- 5.1.92 Mr Symington stated further that he was not aware of any technicality which prevented SARS from appointing Mr Pillay on a fixed-term contract basis after his retirement.

**Evidence adduced by Mr Nic Coetzee**

- 5.1.93 An interview was conducted with Mr Coetzee on 25 March 2019, who was unrepresented during the proceedings.
- 5.1.94 Mr Coetzee stated that he was a Human Resources Specialist at SARS prior to his retirement.

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- 5.1.95 Mr Coetzee stated that he had been approached by Mr Pillay during the course of the year 2008. He had advised him that he had discussed the issue of his request for early retirement with Mr Pravin Gordhan who was at the time, the Commissioner of SARS and had also discussed the matter with the then Minister of Finance.
- 5.1.96 During the course of June 2009, he was requested to prepare a submission to the then recently appointed Commissioner, Mr Magashula to the effect that Mr Pillay requested early retirement from SARS in terms of section 16 of the Public Service Act, to pursue other interests, but to also make provision in the submission for his subsequent retention at SARS. Mr Coetzee did as he was requested.
- 5.1.97 A copy of his original submission was however not provided to my office for analysis. However, his response e-mail correspondence to Mr Magashula on 08 and 09 October 2009 in which he had expressed his views regarding Mr Pillay's early retirement and re-appointment have been sufficiently dealt with under paragraphs 5.1.7 and 5.1.8 *supra*.
- 5.1.98 Mr Coetzee stated that a long time elapsed after he prepared the submission in the manner he had been requested.
- 5.1.99 The submission only came back to him after it had been signed by Minister Gordhan on or about 18 October 2010. It was then that he noticed that the reason had been altered from the original submission which stated that Mr Pillay intended to retire to pursue other interests. The new reason in the submission signed by Minister Gordhan on or about 18 October 2010 was that Mr Pillay wanted to provide for his children's education.

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- 5.1.100 Mr Coetzee stated that as far as he could recall, only two (02) other people had made recommendations for early retirement at SARS but both recommendations had not been approved.
- 5.1.101 Mr Coetzee stated that he was aware that section 16(6) of the Public Service Act, provided that an Executive Authority may approve the request of an employee to retire before reaching the age of sixty (60) years if there were sufficient reasons for the retirement.
- 5.1.102 Mr Coetzee was concerned by the reasons for the early retirement because that would open the door for other employees to approach SARS in a similar fashion which could potentially cost SARS a lot.
- 5.1.103 Mr Coetzee also stated that: -

*“Minister met the legal requirements, he didn’t do anything wrong in terms of the provisions of the Public Service Act and the GEPA Act (GEPA Law). There was no problem with that because I was responsible to make sure that he didn’t transgress any provision of any act. I made very sure that doesn’t (sic), so I said go ahead, you must now decide if the reasons given for the retirement are sufficient.”*

**Evidence adduced by Ms Minee Suzanne Hendricks**

- 5.1.104 An interview was also conducted with Ms Minee Suzanne Hendricks (Ms Hendricks) on 25 March 2019, who was assisted by her legal team.
- 5.1.105 Ms Hendricks was specifically interviewed on her affidavit to the Nugent Commission, dated 20 June 2018.

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- 5.1.106 Ms Hendricks stated that she was appointed at SARS during November 1999, as an Executive Assistant in the office of the then Commissioner of SARS, Mr Pravin Gordhan.
- 5.1.107 She was then seconded to the Ministry of Finance, where she initially acted as the Chief of Staff, assisting Minister Gordhan to set up his new office, following his appointment as the Minister of Finance.
- 5.1.108 Ms Hendricks confirmed that she was the one who processed the request for Mr Pillay's early retirement, during August 2009.
- 5.1.109 She stated that she could recall the events and steps taken by Minister Gordhan in the processing of Mr Pillay's request for early retirement.
- 5.1.110 Her evidence echoed the evidence given by Minister Gordhan in his interview on 14 November 2018.
- 5.1.111 She stated that on receiving the motivation for the early retirement of Mr Pillay, from Mr Magashula, she had brought it to the attention of Minister Gordhan, who had indicated to her that he wanted to explore the legal foundations of the request.
- 5.1.112 She stated that Minister Gordhan had consulted on the legal opinion given by Mr Symington. They had also discussed this issue with Ms Rebecca Tee, the National Treasury Legal Advisor, who had advised that there was nothing untoward about the request and that Minister Gordhan could consider the request for early retirement with full pension benefits.
- 5.1.113 Ms Hendricks stated that there had been an annexure on the submission prepared to Minister Gordhan by Mr Magashula, which contained the

names of 3000 public service employees who had taken early retirement with full pension benefits. Ms Hendricks could however not provide a copy of that annexure.

5.1.114 Ms Hendricks confirmed that Minister Gordhan had also consulted Mr Michael Olivier, who at the time was the Chairperson of the Remuneration Committee at SARS.

5.1.115 Ms Hendricks stated that she was aware of employees who had retired from SARS and re-appointed to the same position. She provided the names of Messrs. Kosie Louw and Trevor van Heerden. However, Mr van Heerden was a Commissioner of SARS who had been retained as a Special Advisor.

#### Application of the relevant legal framework

#### **The South African Revenue Service Act, 1997 (SARS Act)**

5.1.116 Section 2 of the SARS Act establishes SARS as an organ of state within the Public Administration, but as an institution outside the public service.

5.1.117 Not all provisions of the Public Service Act, 1994, are applicable to SARS employees.

5.1.118 Section 19 of the SARS Act however governs the retirement and pension rights of SARS employees. Section 19 provides that: -

#### ***“19 Pension rights***

*(1) A person appointed by SARS as an employee-*

- a) *Becomes a member of the Government Employees' Pension Fund mentioned in section 2 of the Government Employees' Pension Law, 1996 and*
- b) *Is entitled to pension and retirement benefits as if that person is in service in a post classified in a division of the Public Service mentioned in section 8(1)(a)(i) of the Public Service Act."*

5.1.119 Therefore, in terms of section 19 of the SARS Act, SARS employees are deemed to be part of the public service for purposes of pension and retirement benefits and are therefore regulated by the Government Employees' Pension Law, 1996.

#### **The Public Service Act, 1994 (PSA)**

5.1.120 Section 16 of the PSA governs the pension rights of employees in public service. Section 16 provides that: -

#### ***"16 Retirement and retention of services***

*(1) (a) Subject to the provisions of this section, an officer,.... shall have the right to retire from public service, and shall be so retired, on the date when he or she attains the age of 65 years: Provided that a person who is an employee on the day immediately before the commencement of the Public Service Amendment Act, 1996, has the right to retire on reaching the retirement age or prescribed retirement date provided for in any other law applicable to him or her on that day.*

*(2A) (a) Notwithstanding the provisions of subsection (1) and (2) (a), an officer,...shall have the right to retire from the public service on the date on which he or she attains the age of 55 years, or on any date after that date."*

5.1.121 Section 16(2A), read with section 16(1)(a) of the PSA therefore confers an option on any employee who has reached the age of 55 years to retire from public service and must retire upon reaching the age of 65 years.

5.1.122 Mr Pillay was 57 years of age at the time his application for early retirement was approved by Minister Gordhan on or about 18 October 2010.

5.1.123 There is no dispute that Mr Pillay had a right in law to apply for early retirement.

5.1.124 Section 16(6) of the PSA regulates early retirement at the request of an employee with the approval of an Executive Authority (the Minister). Section 16(6) provides that: -

*"(6) (a) An executive authority may, at the request of an employee, allow him or her to retire from the public service before reaching the age of 60 years, notwithstanding the absence of any reason for dismissal in terms of section 17(2), **if sufficient reason exists for the retirement.** (My emphasis)*

*(b) If an employee is allowed to so retire, he or she shall, notwithstanding anything to the contrary contained in subsection (4), be deemed to have retired in terms of that subsection, and he or she shall be entitled to such pension as he or she would have*



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*been entitled to if he or she had retired from the public service in terms of that subsection.”*

5.1.125 Section 16(4) of the PSA provides that: -

*“(4) An officer, other than a member of the services or an educator or a member of the State Security Agency who has reached the age of 60 years may, subject in every case to the approval of the relevant executive authority, be retired from the public service.”*

5.1.126 Having analysed the provisions of section 16 and in particular section 16(6), it is apparent that apart from the requirement that **“sufficient reason”** must exist for the early retirement under the section, the key words in section 16(6) are the words **“retirement”** and **“retire”**.

5.1.127 It is my view that the starting point therefore is to consider the meaning of the words **“retire”** and **“retirement”** to determine whether Mr Pillay did in fact and in law retire from SARS.<sup>21</sup>

5.1.128 The terms **“retirement”** and **“retire”** are not defined in the PSA or the GEPF Law and its Rules

5.1.129 In *Cool Ideas 1186 CC v Hubbard and Another*<sup>22</sup> the Constitutional Court considered the proper approach to statutory interpretation. The court stated the following: -

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<sup>21</sup> The provisions of section 16(6)(a) and (b) were cited by Mr Pillay in his request to Mr Magashula for the approval of his early retirement. It should however be noted that Mr Magashula's submission to Minister Gordhan, dated 12 August 2010, recommending the approval of Mr Pillay's early retirement and retention at SARS as Deputy-Commissioner was not done in terms of section 16(6)(a) and (b) but in terms of section 16(2A) of the PSA, the significance of which will be discussed at a later stage.

<sup>22</sup> *Cool Ideas 1186 CC v Hubbard and Another* 2014 (4) SA 474 (CC) 484.



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*“[28] A fundamental tenant of statutory interpretation is that the words in a statute must be given their ordinary grammatical meaning, unless to do so would result in an absurdity. There are three important interrelated riders to this general principle, namely:*

- a) that statutory provisions should always be interpreted purposively;*
- b) the relevant statutory provision must be properly contextualised; and*
- c) all statutes must be construed consistently with the Constitution, that is, where reasonably possible, legislative provisions ought to be interpreted to preserve their constitutional validity. This proviso to the general principle is closely related to the purposive approach referred to in (a).”*

- 5.1.130 In accordance with the principles of statutory interpretation, when a statute uses terms that are not defined in the statute, the approach is to consider the ordinary meaning of that term as defined in the dictionary.<sup>23</sup>
- 5.1.131 According to the Oxford South African Concise Dictionary the term **“retire”** is defined as: *“Leave one’s job and cease to work, especially because one has reached a particular age.”* The term **“retirement”** is defined as: *“The action or fact of retiring. 2. The period of one’s life after retiring from work.”*
- 5.1.132 Context is important, and I therefore also considered the purpose of section 16 of the PSA, and the context in which it applies.
- 5.1.133 The provisions in section 16(6) of the PSA specifically refer to an employee requesting an employer to retire from the public service. The outcome

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<sup>23</sup> See, *Ity Capital SA Property Holdings LTD v Chavonnes Badenhorst St Clair Cooper and others* 2018(4) SA 71 (SCA) at 81 – 82.

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would be that of an employee retiring and consequently leaving his or her employment with that employer. I interpret section 16 of the PSA as regulating the termination of an employment relationship through retirement. That is the purpose of the provision and the context in which it appears.

- 5.1.134 The purpose of section 16(6) of the PSA, and the context in which the term “retirement” has been used, leads one to the conclusion that the term “retirement” in the section refers to an employee who leaves his or her employment with an employer because he or she has reached an age at which he or she may or should retire from employment.
- 5.1.135 I considered the memoranda from Mr Pillay to Mr Magashula, dated 25 August 2009 and 27 November 2009 as well as the submission from Mr Magashula to Minister Gordhan, dated 12 August 2010 and determined that they did not contemplate Mr Pillay terminating his employment with SARS. What was recommended in these documents was that Mr Pillay would take early retirement on 01 September 2010 and immediately be retained by SARS on the same day, and to the same position on a fixed-term contract, notwithstanding that his “early retirement” had been approved by Minister Gordhan on or about 18 October 2010. In terms of all three documents, there would have been no break in his services with SARS.
- 5.1.136 Having considered the GEPP withdrawal forms, the letter from SARS to Mr Pillay, dated 07 January 2011 and the fixed-term employment contract between Mr Pillay and SARS, signed on or about 07 February 2011 with a commencement date of 01 January 2011, it would appear that SARS approved Mr Pillay’s early retirement with effect from 31 December 2010 but immediately re-appointed him the following day on 01 January 2011.

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- 5.1.137 Mr Magashula also conceded during the interview that there was no break in the employment relationship after his recommendation to Minister Gordhan for the early retirement of Mr Pillay was approved on or about 18 October 2010. There had never been an intention for Mr Pillay to retire, because of his contribution to SARS.
- 5.1.138 Mr Pillay also stated during the interview that his intention was to remain at SARS but in a different capacity. However, his main objective was to access his pension money.
- 5.1.139 Accordingly, there was never a break in Mr Pillay's employment with SARS between 2010 and 2011. He was employed by SARS throughout that period.
- 5.1.140 Therefore, in my view Mr Pillay did not retire on 31 December 2010 as envisaged in section 16(6) of the PSA. For similar reasons, he did not retire on 31 December 2010 as envisaged in Rule 14.3 of the GEPP Rules.
- 5.1.141 If there was no retirement from SARS, and no retirement was contemplated, then the approval of the early retirement in the circumstances was not authorised by statute and was therefore irregular.
- 5.1.142 The approval of early retirement with full benefits was not authorised by statute and was irregular.
- 5.1.143 The funding of the full retirement benefits by SARS through the payment of the actuarial shortfall or deficit,<sup>24</sup> to the GEPP in terms of the applicable GEPP Law and Rule, was not authorised by statute and was irregular.

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<sup>24</sup> This amount, according to Mr Magashula's memorandum to Minister Gordhan, was R1 258 345.99.

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- 5.1.144 But even if retirement had been contemplated, and Mr Pillay had in fact retired on these facts, the question that arises for the purpose of early retirement under section 16(6)(a) of the PSA is whether “**sufficient reason exist**” for his early retirement.
- 5.1.145 The inquiry into whether there were sufficient reasons for the early retirement is an objective one. It is not enough for the Minister to say that there are sufficient reasons for the early retirement. There must be a rational connection between the Minister’s approval of the early retirement under the section, on the one hand, and the reason(s) provided for that approval, on the other. The Minister must provide a rational basis for considering such reason to be sufficient, otherwise his approval would become irrational and susceptible to being set aside on review.
- 5.1.146 This inquiry brings into light Mr Coetzee’s cautionary observations to Mr Magashula in email correspondence, dated 08 and 09 October 2009, about two similar applications for early retirement having been refused by the Minister. Mr Coetzee could not recall the circumstances of the two applications and I could therefore not explore what the reasons were in those two similar circumstances that the Minister considered to be insufficient. Were they similar to those offered by Mr Pillay? If so, why there are now sufficient reasons for Mr Pillay’s early retirement when there were not in those two similar applications.
- 5.1.147 Furthermore, if there was precedent as was stated in evidence, and that nothing was wrong in principle and in law for Mr Pillay to go on early retirement, why then did Mr Magashula still deem it necessary to seek advice from the erstwhile HR Specialist, Mr Coetzee on the correctness of his recommendation.

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- 5.1.148 Despite Mr Coetzee's expressing his misgivings to Mr Magashula about such a recommendation and the effect it might have in general, the latter proceeded to put into effect Mr Pillay's request for early retirement.
- 5.1.149 Mr Coetzee in his e-mail correspondence, dated 08 October 2009 indicated that he had at some point in June dealt with the matter, and that there were two different submissions on reasons for Mr Pillay's request for early retirement which he referred to as attachments. Unfortunately I was not provided with the attachments by SARS in order to determine what they related to.
- 5.1.150 I am not persuaded that there is a rational connection between the Minister's approval of the early retirement and the reasons provided by Mr Pillay for that approval, when considering the facts and what subsequently transpired. At some point Mr Pillay had indicated financial pressures and the need to access his pension fund for his children's education, then later stated that his health had deteriorated but was nevertheless willing to be retained at SARS but in a less stressful working arrangement. Yet Minister Gordhan approved the early retirement and with the same stroke of the pen and in the same motivation also approved his retention as Deputy Commissioner at SARS. Mr Pillay was subsequently also appointed as Acting Commissioner of SARS, a position which would ultimately result in more responsibilities for Mr Pillay.
- 5.1.151 I agree with the opinion of Advocate Brassey SC that the motivation being approved by Minister Gordhan: -

*"... had the effect of deeming Mr Pillay to be a contributing member (of the GEPP) but absolving him of the need to make the contribution. This*

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*benefit, which was considerable, augmented his remuneration in the circumstances.”*

- 5.1.152 When these circumstances are considered together with the fact that Minister Gordhan and Mr Pillay had a longstanding political kinship dating back to the 1970's, it would not be straying from the realm of reasonableness to draw the conclusion that this was simply an elaborate arrangement designed to retain Mr Pillay on preferential terms.
- 5.1.153 I am concerned of the effect that such an arrangement would have on the fiscus if every public servant could access their full pension money and still remain on the payroll of the departments until their actual retirement.
- 5.1.154 I now consider whether Minister Gordhan would ordinarily be authorised to approve the early retirement of Mr Pillay with full pension benefits at his request, if there was an intention to retire and if there was in fact, a retirement.
- 5.1.155 Mr Magashula's recommendation to Minister Gordhan, dated 12 August 2010, for the approval of Mr Pillay's early retirement with full pension benefits, and for the approval of Mr Pillay's retention as Deputy Commissioner of SARS from the date of his early retirement was made in terms of section 16(2A) of the PSA. Minister Gordhan approved these recommendations also in terms of that section on or about 18 October 2010. But section 16(2A) does not entitle Mr Pillay to early retirement with full pension benefits. It also does not authorise the Minister to approve early retirement with full pension benefits and immediate retention in that position post retirement.

5.1.156 It is trite in law that the Minister cannot perform any function or exercise any power beyond that which is conferred upon him by law.<sup>25</sup> Section 16(2A) of the PSA does not confer any power on Minister Gordhan to approve Mr Pillay's early retirement with pension benefits and immediate retention in the position from which he retired.

5.1.157 Since section 16(2A) of the PSA does not entitle Mr Pillay to retirement with full pension benefits, it also does not trigger the provisions of section 17(4) of the GEPF Law.

5.1.158 Section 17 of the GEPF Law provides that: -

***"17 Funding of Fund***

1) ...

2) ...

3) ...

*If any action taken by the employer or if any legislation adopted by parliament places any additional financial obligation on the Fund, the employer or the Government or the employer and the Government, as the case may be shall pay to the Fund an amount which is required to meet such obligation."*

5.1.159 The recommendation by Mr Magashula and the consequent approval by Minister Gordhan on or about 18 October 2010, was therefore not

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<sup>25</sup> *Fedsure Life Assurance Ltd and Others v Greater Johannesburg Transitional metropolitan Council and Others* 1999(1) SA 374 (CC) at para [58]; *Minister of Public Works and Others v Kyalami Ridge Environmental Association and Another (Mukhwevho Intervening)* 2001 (3) SA 1151 (CC) at para [34] and *Affordable Medicines Trust and Others v Minister of Health and Others* 2006 (3) SA 247 (CC) at para [49].

authorised by the sections in the statutes cited in Mr Magashula's memorandum and recommendation to Minister Gordhan, and therefore irregular.

- 5.1.160 If however, the recommendation by Mr Magashula and the subsequent approval by Minister Gordhan was made in terms of section 16(6) of the PSA, the outcome would have been different. Section 16(6)(a) of the PSA differs materially from section 16(2A) of the PSA.
- 5.1.161 I wish to emphasise that although Mr Pillay's request for early retirement was made in terms of section 16(6) of the PSA, Mr Magashula's recommendation to Minister Gordhan and the Minister's subsequent approval of the recommendation were made expressly in terms of a different section, which was section 16(2A) of the PSA.
- 5.1.162 Section 16(6)(a) of the PSA has employed the words "*may...allow*" indicating that a discretion is conferred upon an executive authority to allow an employee under the age of 60 years to retire early.
- 5.1.163 Section 16(6) does not require that an employee must have reached the age of 55 years (it simply says "*before the age of 60 years*"), meaning that an employee may even be 50 years of age.
- 5.1.164 For section 16(6) of the PSA to apply, the approval by the executive authority must have been done expressly in terms of that section.
- 5.1.165 An employee who is allowed to retire in terms of section 16(6)(a) is automatically entitled to benefits to which people who retired in terms of section 16(4) of the PSA are entitled.



- 5.1.166 There is no need for Ministerial approval of full pension benefits when an employee is allowed to retire in terms of section 16(6)(a) as that occurs automatically. In such cases, the person so retired would be entitled to benefits payable to people who retired at the age of 60 years. They are deemed to have reached the age of 60 years for purposes of the GEPP Law and the Rules. In such a case, section 17(4) of the GEPP Law would be triggered, I quote it again here for ease of reference. Section 17(4) of the GEPP Law provides that: -

***“17 Funding of Fund***

1) ...

2) ...

3) ...

*If any **action** taken by the employer or if any legislation adopted by parliament places any additional financial obligation on the Fund, the employer or the Government or the employer and the Government, as the case may be shall pay to the Fund an amount which is required to meet such obligation”.*(My emphasis)

- 5.1.167 The “**action**” contemplated in section 17(4) of the GEPP Law is that which is taken by the employer by approving the early retirement in terms of section 16(6)(a) of the PSA. The request by an employee does not trigger any additional liability on the part of the GEPP. That request is subject to the approval of the employer. If the employer declines it, no additional liability is triggered. If the employer approves it, subsection 16(6)(b), read with section 6(4) of the PSA results in full pension benefits being payable and therefore additional liability of the employer being triggered.

- 5.1.168 Even if Mr Pillay's early retirement had been approved by Mr Gordhan in terms of section 16(6) of the PSA – and I wish to emphasise that it was not approved under this section but a different section, which was section 16(2A) of the PSA, Minister Gordhan would still not have been authorised to approve Mr Pillay's early retirement with full pension benefits.
- 5.1.169 The reason for this is that the executive authority is only authorised to approve a **request** for early retirement in terms of section 16(6). What is received by the employee as a consequence of that decision would follow by operation of law once an approval to retire in terms of section 16(6) of the PSA was granted by the executive authority. It is not something that the executive authority can approve or disprove.
- 5.1.170 Thus, in approving Mr Pillay's full retirement benefits, Minister Gordhan acted *ultra vires* the powers conferred to him by the PSA.

### **The Public Finance Management Act, 1999 (PFMA)**

- 5.1.171 I have determined that there was no early retirement contemplated. In the absence of a retirement, the approval of the early retirement with full pension benefits was not authorised by statute and was irregular. The result inexorably was that the funding of the full benefits by SARS, through the payment of the actuarial shortfall or deficit was also not authorised by statute and was therefore irregular.
- 5.1.172 In consideration of the irregularity of the payment of the actuarial shortfall, regard must also be had to the Public Finance Management Act, 1999 (PFMA).

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5.1.173 The object of the PFMA is to secure transparency, accountability, and sound management of the revenue, expenditure, assets and liabilities of the institutions to which the PFMA applies.

5.1.174 Section 3, read with Schedule 3 of the PFMA lists SARS as one of the institutions to which the Act applies.

5.1.175 Section 1 of the PFMA defines **irregular expenditure** as: -

*“...**expenditure**, other than authorised expenditure, incurred in contravention of or that is not in accordance with a requirement of any applicable legislation...”* (My emphasis)

5.1.176 Section 38 of the PFMA deals with the general responsibilities of an accounting officer. It reads as follows: -

*“(1) The accounting officer for a department, trading entity or constitutional institution -*

*a)...*

*b)...*

*c) must take effective and appropriate steps to-*

*i. ....*

*ii. Prevent unauthorised, **irregular**, and fruitless and wasteful expenditure and losses resulting from criminal conduct.....”* (My emphasis)

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- 5.1.177 Mr Magashula as the Accounting Officer was required to take effective and appropriate steps to prevent SARS from incurring irregular expenditure.
- 5.1.178 I consider the funding of the full benefits by SARS, through the payment of the actuarial shortfall as irregular expenditure in that it was not authorised by statute.
- 5.1.179 I now turn to consider whether Minister Gordhan was lawfully authorised to also approve the retention of Mr Pillay in the motivation from Mr Magashula, dated 12 February 2010.
- 5.1.180 I am not aware of, nor did my investigation reveal any policy or legislation which regulates the retention of SARS employees on a contract basis. I am therefore of the reasonable view that in the absence of a policy or law regulating the retention of Mr Pillay, the Minister had no authority in law to approve the retention of Mr Pillay.
- 5.1.181 Even if Minister Gordhan had the requisite authority to approve the retention of Mr Pillay, it nevertheless still flouted recruitment processes. When the early retirement was approved by Minister Gordhan on 12 February 2010, it had the effect of vacating the position of Deputy Commissioner of SARS and therefore a fresh recruitment process had to be commenced with to fill the position, which in this case did not occur. The retention had the effect of depriving other suitably qualified candidates from contesting the position in a competitive and transparent recruitment process.
- 5.1.182 Minister Gordhan was accordingly not empowered to also approve the retention of Mr Pillay. His submission that he was advised that this was a

normal practice cannot be accepted as it is not in keeping with a public administration that is transparent and accountable nor does it legitimise a process that is on the face of it, unfair.

- 5.1.183 Flowing from the above principles, in considering the standard that is required from Minister Gordhan as a public functionary, it brings into light the case of *Khumalo and Another v Member of the Executive Council for Education: KwaZulu-Natal*<sup>26</sup> where the Constitutional Court said the following concerning the duty of a functionary to correct any unlawfulness in public administration: -

*"Public functionaries, as the arms of the State, are further vested with the responsibility, in terms of section 7(2) of the Constitution to 'respect, protect, promote and fulfil the rights in the Bill of Rights. As bearers of this duty and in performing their functions in the public interest public functionaries must, where faced with an irregularity in the public administration, in the context of employment or otherwise, seek to redress it. This is the responsibility carried by those in the public sector as part of the privilege of serving the citizenry who invest their trust and taxes in the public administration. This duty is founded, inter alia, in the emphasis on accountability and transparency in section 195(1)(f) and (g) and the requirement of a high standard of professional ethics in section 195(1)(a) of the Constitution."*

## 5.2 Responses to the section 7(9) notice, dated 30 April 2019

- 5.2.1 Section 7(9) of the Public Protector Act provides that: *"If it appears to the Public Protector during the course of an investigation that any person is*

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<sup>26</sup> *Khumalo and Another v Member of the Executive Council for Education: KwaZulu-Natal* 2014 (3) BCLR 333 (CC) paras [35] & [36].

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*being implicated in the matter investigated and that such implication may be to the detriment of that person or that an adverse finding pertaining to that person may result, the Public Protector shall afford such person an opportunity to respond in connection therewith, in any manner that may be expedient under the circumstances.”*

- 5.2.2 The responses provided regarding the section 7(9) notices are considered herein. I have however, not dealt with each and every aspect raised in the responses but that should not be construed as an admission of any kind of the averments contained therein.

**Response received from Mr Ivan Pillay to the section 7(9) notice,  
dated 30 April 2019**

At paragraph 11

- 5.2.3 Mr Pillay stated that my preliminary findings that he did not in fact and in law retire on 31 December 2010 and the finding that the retirement was part of a contrived and unlawful scheme, are fallacious, unsustainable and irrational. He stated the following: -

*“The Public Protector’s argument in this regard rests solely on her reliance on a dictionary definition to find what she considers to be a universally applicable meaning for the word ‘retirement’. In the eyes of the Public Protector no –one can carry on any work after their retirement.*

*I submit that such a conclusion is entirely misconceived and irrational. It ignores reality.”*

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- 5.2.4 He states that SARS have a number of senior officials who retired and continued to work for SARS after retirement on a fixed term contract basis. He referenced Messrs Trevor van Heerden, John Hanssen, Kosie Louw Geert Stevens and Tom Moyane, only three (03) whom were retained by SARS and under different conditions.
- 5.2.5 Mr Pillay suggests that this is something that occurs throughout the public service. It has never been contended that entering into a post-retirement fixed term contract is incompatible with retirement.
- 5.2.6 Mr Pillay argues that in reaching the conclusion that there was no retirement from SARS, I disregarded the evidence before me, including his evidence as well as that of Mr Magashula and Minister Gordhan that they all acted on well considered advice to the effect that there was no legal impediment to him retiring and thereafter being employed by SARS on a fixed term contract basis.
- 5.2.7 I am in respectful disagreement with Mr Pillay's submission that he had in fact retired from SARS during December 2010. The evidence clearly indicates that SARS approved Mr Pillay's early retirement with effect from 31 December 2010 but immediately re-appointed him the following day on 01 January 2011. This fact was not disputed by Mr Magashula in evidence given during interviews on 25 March 2019 or in his subsequent response to the section 7(9) notice provided to my office on 21 May 2019.
- 5.2.8 In the absence of a retirement, Mr Pillay was not entitled to early retirement with full pension benefits under any statutory provision.

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5.2.9 From the evidence available to me, I am of the view that this was an elaborate arrangement to retain Mr Pillay on preferential terms. These terms being that he would continue to receive his full pension benefits without the burden of having to make contributions to the GEPF until he reached the age of 60 years.

5.2.10 Mr Pillay's presentation of senior SARS officials whose circumstances differ from his, according to him had retired and then continued to work on a contract basis does not in my view legitimise this process.

At paragraph 12

5.2.11 Mr Pillay stated that I employed a narrow reading of the motivation Mr Magashula addressed to Minister Gordhan on 12 August 2010 in my determination that Mr Magashula did not seek the approval from the Minister in accordance with the provisions of section 16(6) of the PSA, and thus the approval given by the Minister was *ultra vires*.

5.2.12 Mr Pillay is of the view that I closed my mind to the totality of other evidence which included his memorandum to Mr Magashula, dated 27 November 2009 in which he expressly sought the approval for early retirement in terms of section 16(6)(a) read with subsection (b) of the PSA; and the letter to him from Ms Elsie Pule, the then Chief Officer: Human Resources, dated 07 January 2011, confirming that his early retirement had been approved with specific reference to section 16(6)(a) read with subsection (b) of the PSA.

5.2.13 Mr Pillay further stated that I did not consider the fact that Minister Gordhan's wide consultative process after receiving Mr Magashula's motivation was based on: -



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*“the clear and unambiguous understanding that he was being requested to grant approval in terms of section 16(6) of the PSA;*

*The fact that the approval was indeed granted by Minister Gordhan in terms of section 16(6) of the PSA; and*

*The fact that both SARS and the GEPF thereafter acted in accordance with the approval granted by Minister Gordhan in terms of section 16(6) of the PSA.”*

- 5.2.14 The conclusion drawn by Mr Pillay in this regard is that I limited my enquiry to the references in Mr Magashula’s motivation, dated 12 February 2010, to section 16(2A)(a) of the PSA without also referring to section 16(6), which rendered my conclusions irrational, erroneous and invalid.
- 5.2.15 Mr Pillay’s submission does not in my view derogate from the fact that neither section 16(2A) or section 16(6)(a) and (b) of the PSA authorised Minister Gordhan to approve Mr Pillay’s early retirement with full pension benefits in the manner contemplated in the motivation, dated 12 February 2010.
- 5.2.16 If the motivation to Minister Gordhan and his subsequent approval had been made in terms of section 16(6) of the PSA, there would have been no need to approve retirement with full pension benefits. He was not empowered to do so. The retirement with full pension benefits would have followed by operation of law once the approval had been granted in terms of section 16(6)(a).
- 5.2.17 I accordingly maintain the view that Minister Gordhan’s approval of the motivation was *ultra vires*.

- 5.2.18 I would be remiss if I did not restate at this stage that Minister Gordhan cannot exercise any power and perform any function beyond that conferred upon him by law.

At paragraph 13

- 5.2.19 Mr Pillay curiously argues that his early retirement came at an additional cost to him and was to the financial benefit of SARS. He illustrates his point in the following manner: -

*"Had I not taken early retirement I would have continued in the employ of SARS until I reached the mandatory retirement age of sixty-five years.*

*In that even, I would have remained as a contributing member of the GEPF until the mandatory retirement age.*

*By taking early retirement, in accordance with section 16(6)(a) and (b) of the PSA read with section 1694) thereof, I became entitled to the benefits I would have received as a sixty year old retiree, which are significantly lower than the benefits that I would have received had I retired at the mandatory retirement age of sixty-five.*

*By virtue of the standard terms and conditions of employment of SARS officials, SARS was liable to pay two-thirds of the monthly amount payable to the GEPF in relation to my pension funding....*

*.... As at the date of my retirement on 31 December 2010 I was fifty-seven years and eight months old.*

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*My mandatory retirement date, at age sixty-five, would have been in April 2018. Thus, I would have remained in the employ of SARS for a further period of eighty-eight months from January 2011 until April 2018. During that period SARS would have been liable for the monthly employer's contribution towards the GEPF in respect of my pension funding.*

*As at the date of my retirement on 31 December 2010, the monthly contribution by SARS towards my pension funding was R18 506.86. had my pensionable salary remained at precisely the same level that it was as at 31 December 2010 for the eighty-eight months, then SARS would have been obliged to contribute a further amount of R1 628 603.68 (calculated as 88 times R18 506.86) towards my pension funding.*

*...However, the simple point I make is that the amount that SARS would have paid to the GEPF had I remained in its ordinary employ until the age of sixty-five is greatly in excess of the amount of R1 258 345.99 that it became liable to pay to the GEPF as a result of my early retirement."*

5.2.20 I am of the view that Mr Pillay misdirected himself in this regard. The salient question is whether the payment of the actuarial shortfall to the GEPF by SARS, triggered by Mr Pillay's early retirement with full pension benefits was authorised by statute. I submit that it was not and therefore the expenditure incurred by SARS amounted to irregular expenditure.

5.2.21 I further dispute Mr Pillay's unsubstantiated statements that any findings contained in this report arise from an erroneous application of the facts; an erroneous understanding of the applicable law; a process of irrational reasoning; a clear pattern of bias; and a failure to apply an open and enquiring mind in pursuit of the truth.

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**Response received from Mr Oupa Magashula to the section 7(9) notice, dated 30 April 2019**

At paragraph 16 – 18

5.2.22 In his response to the section 7(9) notice, Mr Magashula stated the following: -

*'It is disputed that retirement implies, in terms of the context of the Act and the factual history of an employee, that such employee may not return on a temporary basis to the same department. The word retirement depicts a position for a person of 55 years and older where they can terminate their permanent employment. To interpret this as a qualification to be re-appointed temporarily to any post in the same department would lead to absurd consequences, and could never have been the intention of the legislature.*

*To argue that Mr Pillay, who earned his pension by making his own pension contributions over many years and by rendering outstanding services, could never be re-appointed in a temporary position with no further pension benefits is, with respect an absurd construction.*

*The logic for this request and the sufficient reasons provided by Mr Pillay allow the Minister to legally approve his early retirement from permanent employ and could never have meant that he could not be re-employed in a temporary position for a fixed terms as aforesaid."*

5.2.23 Mr Magashula respectfully misdirected himself in his response to the section 7(9) notice.

- 5.2.24 SARS had a right to re-appoint Mr Pillay, however this right must be exercised in a manner which observes a competitive and transparent recruitment process, but this did not occur. The approval of the retention by Minister Gordhan prevented other suitably qualified candidates from contesting the position.

At paragraph 22 – 23

- 5.2.25 Mr Magashula also stated that: -

*“... to argue that my recommendation to the Minister was strictly limited to Section 16(2A) of the PSA is simply incorrect as was indicated in the preliminary findings of the Public Protector and as born (sic) out by the various inputs of experts when all the sections were interpreted in context, and as a whole strictly in terms of the interpretation of statutes. The Minister and I were advised accordingly. From all the evidence and documentation available it is clear that Section 16(6)(a) and (b) were duly considered and applied. I reiterate that I am not a lawyer and wrote my memorandum to the Minister as a lay man. The Minister did not rush into a decision but appointed legal and administrative advisors which led to the application of Section 16(6) read with all other relevant and related sections. If Mr Pillay was in law entitled to apply for early retirement the provisions of the act is clear, and all legal advice pointed to the fact that the Minister was entitled to approve if he was satisfied with the reasons.*

*The ultimate finding that Minister Gordhan acted ultra vires the powers confer (sic) to him by the PSA is untenable in law and fact.”*

- 5.2.26 The contents of these paragraphs are noted but I reiterate that even though Mr Pillay had a right in law to apply for early retirement, there was in fact and in law not retirement contemplated by him or Mr Magashula. In the absence of a retirement, Mr Pillay was accordingly not entitled to his full pension benefits.
- 5.2.27 Even if a retirement had been contemplated – which I stress that in this case there was not – Minister Gordhan was not authorised in terms of section 16(6) of the PSA to authorise the payment of the full pension benefits as that would have occurred by operation of law. What Minister Gordhan was lawfully authorised to approve in terms of section 16(6) was only the early retirement of M Pillay. In light of this, Minister Gordhan acted *ultra vires* the powers which were conferred to him by the PSA.
- 5.2.28 Similarly, Minister Gordhan was not authorised by law to approve the retention of Mr Pillay and in that respect as well, Minister Gordhan *acted ultra vires*.

**Response received from Minister Gordhan to the section 7(9) notice, dated 30 April 2019**

- 5.2.29 In the response received from Malatji Kanyane Incorporated, purportedly acting on behalf of Minister Gordhan, the following salient points were raised: -

*“3.1 The evidence makes it clear that Minister Gordhan acted perfectly honestly and in good faith at all times. He made it clear in his evidence. It is borne out by all the other evidence described in your letter. It was made clear by Mr Magashula’s evidence, recited in paragraph 13.1.1.57 of your letter, that Minister Gordhan had indicated to him at the time that he would*

*only consider Mr Pillay's request "if he was convinced that it was legally possible and permissible for him to take such a decision.*

*3.4 All the people whom he consulted confirmed that it would be competent, lawful and appropriate for him to approve Mr Pillay's request. There was not a single dissenting voice. Minister Gordhan thus had every reason to trust that he could lawfully and properly approve Mr Pillay's request.*

*The highwater mark of your findings against Minister Gordhan is that you disagree with the legal advice he was given, and upon which he acted. That does not constitute misconduct of any kind. We submit, in any event, for the following reasons, that your legal opinion is mistaken.*

#### **4 YOUR PROPOSED ADVERSE FINDINGS**

##### **4.1 Three technical points:**

*4.1.1 Your letter proposes to find that Minister Gordhan's approval of Mr Pillay's retirement was unlawful on three legal-technical grounds. We shall address each of them in turn. We submit that they are all mistaken.*

##### **4.2 Mr Pillay indeed retired:**

*4.2.1 You propose to hold that Mr Pillay did not in fact retire because he continued in an employment relationship with SARS.*

*4.2.2 It is common cause that Mr Pillay terminated his permanent employment with SARS and was reappointed under a fixed term*

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*contract. He, in other words ceased to be permanently employed under his original contract of employment and became temporarily employed under a new fixed term contract.*

*4.2.3 The termination of Mr Pillay's permanent employment with SARS constituted a retirement within the meaning of the Public Service Act (PSA) of 1994:*

*4.2.3.1 Section 8(2) says that public service employees may be permanently or temporarily.*

*4.2.3.2 Section 8(3) makes it clear that the provisions of section 16, relating to retirement, only apply to permanent employees.*

*4.2.3.3 A permanent employee, who retires under section 16, may accordingly take up temporarily employment with SARS thereafter. It does not contradict or undo his retirement. He remains retired in the sense that his permanent employment has been terminated.*

*4.2.4 Mr Pillay thus retired in the sense that his permanent employment was terminated in terms of section 16. His temporary employment thereafter did not contradict or undo his retirement in any way.*

*4.2.5.....*

*4.2.6 Your conclusion that Mr Pillay in fact did not retire is accordingly mistaken.*

**4.3 The section under which Minister Gordhan acted**



4.3.1 You suggest that Minister Gordhan's decision was unlawful because he purported to act under section 16(2A) of the Public Service Act. You accept that he had the power to take the decision under section 16(6), but contend that he invoked the wrong section.

4.3.2 Your conclusion is mistaken for the following reasons:

4.3.2.1 Minister Gordhan made it clear that he obtained advice from all concerned that it was competent for him to approve Mr Pillay's request. It is also common cause that the advice was correct in that he had the power to do so under section 16(6). Minister Gordhan's decision was not tied to any particular provision. Mr Magashula's letter variously mentioned section 16(2A) and section 16(2)(a) but that was clearly not Minister Gordhan's concern. He dealt at all times with the substance of the request which, he had been advised, was perfectly lawful and permissible. That was the basis on which he made his decision.

4.3.2.2 It is a matter of law irrelevant, even if SARS cited the wrong provision in their memorandum to Minister Gordhan. The Supreme Court of Appeal articulated this principle in *Howick's case* as follows:

4.3.2.3 Under the doctrine in *Latib's case*, where an empowering statute does not require that the provision in terms of which a power is exercised be expressly specified, the decision-maker need not mention it. Provided moreover that the enabling statute grants the power sought to be exercised, the fact that the decision-maker

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*mentions the wrong provision does not invalidate the legislative or administrative act.” (our emphasis)*

*4.3.2.4 Minister Gordhan’s decision was thus valid even if the SARS memorandum cited the wrong section.*

***4.4 Minister Gordhan’s approval of Mr Pillay’s pension benefits***

*4.4.1 Your last point is apparently that Minister Gordhan’s approval of Mr Pillay’s application was unlawful because he approved the request from SARS from Mr Pillay to retain his full pension benefits. Your point seems to be that that is an automatic consequence of section 16(6)(b) and not something subject to the Minister’s discretion.*

*4.4.2 But that is pure semantics without substance. The Minister approved Mr Pillay’s retirement under section 16(6). The consequences of his retirement was that he retained his full pension benefits. In other words, what the Minister approved, was indeed Mr Pillay’s retirement with full pension benefits.”*

5.2.30 Having analysed the response provided by Malatji Kanyane Incorporated, I am of the view that their essential averments have been addressed under reply to responses received from Messrs Pillay and Magashula. I do not deem it necessary or practical to belabour the point further save to highlight that the issue under investigation was not that the wrong section is cited, which in my view is not material, what is material however is whether Minister Gordhan was authorised to approve the early retirement of Mr Pillay with full pension benefits, as well as his retention at SARS, under the circumstances which he did.

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Conclusion

- 5.2.31 As neither Mr Pillay's request nor Mr Magashula's recommendation by their terms contemplated retirement, I can conclude that there was no retirement in fact and in law.
- 5.2.32 In the absence of a retirement, Mr Pillay was not entitled to early retirement with full pension benefits under any statutory provision.
- 5.2.33 Even if there was a retirement, which I am of the belief that there was not, Section 16(2A) of the PSA – the section in terms of which Ministers Gordhan's approval was purportedly sought and granted – does not confer any power on a Minister to approve early retirement with pension benefits, or the immediate retention of an employee in the position from which they have retired, and therefore Minister Gordhan was not authorised by section 16(2A) of the PSA to approve Mr Pillay's early retirement request with full pension benefits.
- 5.2.34 Mr Pillay was not entitled to early retirement with full pension benefits under section 16(2A) of the PSA because the section makes no provision for such full retirement benefits.
- 5.2.35 Section 16(2A) only confers a right on an employee who has reached the age of 55 years to retire from public service and under that section, no ministerial approval is required.
- 5.2.36 Minister Gordhan was also not authorised by section 16(6)(a) read with subsection (b) of the PSA to approve Mr Pillay's full pension benefits because the benefits to which an employee is entitled on early retirement are regulated by section 16(6)(b) of the PSA. Therefore, Minister Gordhan is only authorised to approve a **request** for early retirement in terms of

section 16(6)(a). What is received by the employee as a consequence of that decision would accrue *ex lege*, and therefore does not require ministerial approval.

- 5.2.37 By recommending that Minister Gordhan approve Mr Pillay's early retirement "***without downscaling of his retirement/pension benefits...***" SARS, through Mr Magashula as the then Commissioner, took the "***action***" contemplated in section 17(4) of the GEPP Law, thereby triggering additional liability to the GEPP.
- 5.2.38 The additional liability according to Mr Magashula's memorandum to Minister Gordhan, was the amount of R1 258 345.99.
- 5.2.39 Payment of the additional liability or actuarial shortfall by SARS amounted to irregular expenditure as envisaged by section 38(c)(ii) of the PFMA.
- 5.2.40 It is apparent that the intention in this transaction was for Mr Pillay to be treated as an ordinary pensioner and beneficiary of the GEPP and to receive full pension benefits, while he was still employed by SARS in the same position. This, in my view is contrary to the purpose and object of the pension fund, which is to pay benefits to employees when they leave employment with a particular employer.
- 5.2.41 What in essence occurred in these circumstances is that Mr Pillay received his full retirement benefits while still being employed by SARS, and without the burden of having to pay contributions to the GEPP until the age of 60 years, like other contributing members of the fund.
- 5.2.42 The prejudice to the GEPP was ameliorated by the payment of the actuarial shortfall by SARS.

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- 5.2.43 The financial benefit which accrued to Mr Pillay was his receiving the full retirement benefits payable to an employee who contributed until normal retirement date when in fact he did not do so.
- 5.2.44 In the end, it was SARS that was prejudiced and, by extension, the taxpayer in that there was an adverse effect on the fiscus.
- 5.2.45 Minister Gordhan resolved to approve that SARS accepts liability for additional expenditure without the realisation of greater future potential fiscal savings.
- 5.2.46 My conclusion is therefore that the arrangement contemplated in the memorandum and subsequent implementation by SARS was contrived and not lawful.
- 5.2.47 I am of the view that the discretion given to executive authorities in terms of section 16(6) of the PSA should be exercised with restraint to prevent any unwarranted burden being exerted on the fiscus as well as possible abuse of power.
- 5.2.48 Minister Gordhan was not authorised by any law to also approve the retention of Mr Pillay as Deputy Commissioner of SARS. In the absence of an empowering statutory provision, it can be concluded that Minister Gordhan acted irregularly in approving the retention of Mr Pillay as Deputy Commissioner of SARS.

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## 6. FINDINGS

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

### 6.1 **Regarding whether Minister Gordhan irregularly approved the early retirement of Mr Ivan Pillay with full pension benefits and his subsequent retention at SARS in the same position: -**

6.1.1 The allegation that Minister Gordhan irregularly approved the early retirement of Mr Ivan Pillay with full retirement benefits and his subsequent retention at SARS is substantiated.

6.1.2 Since neither Mr Pillay's request for early retirement nor Mr Magashula's recommendation to Minister Gordhan contemplated retirement, there was no retirement in fact and in law. If there was no retirement in fact and in law, it can be concluded that Mr Pillay was not entitled to early retirement with full pension benefits under any statutory provision.

6.1.3 Even if retirement had been contemplated and there was in fact a retirement, Minister Gordhan was not authorised by section 16(2A) of the PSA to approve Mr Pillay's early retirement request with full pension benefits as this section does not confer any power on the Minister to approve early retirement with full pension benefits.

6.1.4 Mr Pillay was not entitled to early retirement with full pension benefits under section 16(2A) of the PSA because the section makes no provision for such full retirement benefits. Section 16(2A) of the PSA only confers a right on an employee to retire from public service upon reaching the age

of 55 years. In terms of that section, no ministerial approval need be sought.

6.1.5 Even if the request by Mr Pillay for early retirement had been sought in terms of section 16(6) of the PSA, Minister Gordhan would also not have been authorised by section 16(6)(a) read with subsection (b) of the PSA to approve Mr Pillay's full pension benefits because the benefits to which an employee is entitled to on early retirement are regulated by section 16(6)(b) of the PSA and occur by operation of law. No ministerial approval is required in such instances.

6.1.6 Minister Gordhan's conduct therefore amounts to improper conduct as envisaged by section 6(4)(a)(ii) of the Public Protector Act.

6.1.7 When Mr Magashula's made the recommendation to Minister Gordhan for the approval of Mr Pillay's early retirement without downscaling of his retirement/pension benefits, SARS, through Mr Magashula, took the "**action**" contemplated in section 17(4) of the GEPP Law and thereby triggering the additional liability to the GEPP.

6.1.8 Payment of the additional liability by SARS amounted to irregular expenditure as envisaged by section 38(c)(ii) of the PFMA and maladministration as contemplated by section 6(4)(a) of the Public Protector Act.

6.1.9 Minister Gordhan also acted *ultra vires* in approving the retention of Mr Pillay as Minister Gordhan was not authorised by law to do so.

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## **7. REMEDIAL ACTION**

The appropriate remedial action taken as contemplated in section 182(1)(c) of the Constitution, with a view of remedying the impropriety referred to in this report is the following: -

### **7.1 The President of the Republic of South Africa**

- 7.1.1 To take note of the findings in this report in so far as they related to the erstwhile Minister of Finance, Mr Gordhan and to take appropriate disciplinary action against him for failing to uphold the values and principles of public administration entrenched in section 195 of the Constitution, and the duty conferred on Members of the Cabinet in terms section 92(3)(a) of the Constitution, to act in accordance with the Constitution.

### **7.2 The Commissioner of SARS**

- 7.2.1 To set in motion steps to recover the money paid as an actuarial shortfall on behalf of Mr Pillay by SARS to GEPI from the erstwhile Commissioner of SARS, Mr Magashula.
- 7.2.2 To ensure that SARS introduces as part of their recruitment processes, regulations, policies and practices which are clear and unambiguous relating to early retirement and staff retention.



## 8 MONITORING

- 8.1 The President of the Republic of South Africa must, within thirty (30) days from the date of the issuing of this Report and for approval of the Public Protector, submit an Implementation Plan to the Public Protector indicating how the remedial action referred to in paragraph 7.1 of this Report will be implemented.
- 8.2 The Commissioner of SARS must, within thirty (30) days from the date of the issuing of this Report and for approval of the Public Protector, submit an Implementation Plan to the Public Protector indicating how the remedial action referred to in paragraph 7.2 of this Report will be implemented.
- 8.3 In line with the Constitutional Court decision in ***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 action prescribed in this Report is legally binding on the President of the Republic of South Africa, unless a court order directs otherwise.



ADV BUSISIWE MKHWEBANE  
PUBLIC PROTECTOR OF THE  
REPUBLIC OF SOUTH AFRICA

DATE: 24/05/2019