

NO MORE IGNORING THE AUDITOR-GENERAL'S RECOMMENDATIONS: *THE MATERIAL IRREGULARITY REGULATIONS* READ WITH THE *PUBLIC AUDIT AMENDMENT ACT OF 2018*

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For at least the last five years, the Auditor-General (AG), a Chapter 9 institution constitutionally-mandated to audit the financial statements of all national and provincial departments, municipalities and State-Owned Enterprises (SOEs), has emphasised the alarming regression in clean audit outcomes. This regression, according to the AG's *Consolidated General Report on National and Provincial Audit Outcomes 2017-2018* was mainly due to the flagrant disregard of the AG's audit recommendations. Not only did fruitless and wasteful expenditure increased by over 200% from the previous year, to R2.5 billion, but at national level, clean audits appallingly regressed to 23%, from an already paltry 30% in the previous financial year.

This simple disregard of the AG's recommendations and lack of consequences might to an extent be tackled with the *Public Audit Amendment Act* of 2018 (the Amendment Act), which came into operation on 1 April 2019. The Amendment Act must be read with the new *Material Irregularity Regulations* and *Investigations and Specials Audits Regulations*, which were also published on 1 April 2019.

What do these legislative amendments entail?

The Amendment Act provides the AG with additional powers over and above the AG's auditing and reporting functions.

It firstly provides the AG with the power to refer a "suspected material irregularity" to a relevant public body (for instance the Hawks) for further investigation. A material irregularity relates to any non-compliance with or contravention of legislation, fraud, theft or a breach of a fiduciary duty (of the accounting officer), which has resulted or is likely to result in a material financial loss for instance. This is where one must look at the *Material Irregularity Regulations* (the Regulations), which give practical effect to the Amendment Act.

The Regulations stipulate the steps the AG must take when he suspects such a material irregularity. Not only must all relevant information be provided to the accounting officer or accounting authority on the AG's finding, but the AG must invite such accounting officer, for instance, to make written representations within a stipulated time. A strong provision enhancing accountability and transparency is the requirement that the accounting officer must, based on documentary evidence, show what steps were taken to deal with this irregularity, the outcome of such steps and what steps have been taken against the responsible person. Failing to do so provides the AG with the right to proceed on the basis that no action was taken.

A further important check and balance introduced is that when the AG refers such material irregularity to be further investigated by a public body (again the Hawks for instance) the public body must report back to the AG. The Regulations require reporting intervals to be determined by the AG and the AG must be informed of the outcome.

A second additional power afforded to the AG is the power to implement remedial action when the accounting officer or accounting authority ignore the AG's recommendations relating to a material irregularity. The Regulations provide that the accounting officer or accounting authority, must, within the time stipulated, submit verifying documents showing how the recommendations were implemented and if not, provide reasons for failing to do. If the AG is still unsatisfied, he has the right to inform the accounting officer or accounting authority of what remedial action will be taken, the timeline for it to be implemented and when to report on progress. Again, accountability is enhanced by requiring a document trail showing details of steps taken to implement the recommendation, the outcome of such steps, and for instance what has been done to recover any amount due to the State. If the accounting officer or accounting authority fail to fulfil these steps, then the AG again may proceed on the basis that it was not implemented, which will have dire consequences for the accounting officer or members of the accounting authority - as can be seen from what follows.

Lastly, the AG now has the power to issue a certificate of debt to the accounting officer, the accounting authority or members of the accounting authority if they failed to implement the remedial action and it resulted in a financial loss to the State. This certificate of debt essentially stipulates the amount owed by the accounting officer, for instance, in his personal capacity to the State. This can be recovered from the accounting officer through a civil debt recovery procedure. The Regulations and the Amendment Act make it clear that it not only relates to a current accounting officer, but it can even extend to a former accounting officer or former member of the accounting authority.

This additional power caused concern during the public deliberations of the proposed Amendment Act in 2018, as it was argued that the AG's constitutional duty relates to auditing and reporting on the financial accounts and the Office should not be involved in the civil recovery of debt. The Parliamentary Legal Advisor, however, held that the Constitution allows additional powers to be prescribed to the AG in terms of legislation and in this instance, the additional powers are rationally linked to the AG's main function. The question, however, remains whether it would be practically feasible for the AG to pursue such civil recovery?

The Regulations stipulate the process before such a certificate of debt can be issued. This process includes the right of the accounting officer or accounting authority, or members of such accounting authority to make written representations on the matter. If the AG still intends to proceed, they are entitled to make oral representations before an advisory committee established for this purpose. In this instance, they have a right to legal



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representation when appearing before this committee, but the Regulations make it clear that it will not be at the State's expense. The advisory committee must submit its findings to the AG who must - within a reasonable time - inform the accounting officer, accounting authority or the members of the accounting authority (as the case may be), whether he will proceed with issuing a certificate of debt. If a certificate of debt is to be served, it must also be served on the relevant executive authority, which is required to report to the AG at specific intervals on the progress of collecting money.

The reality is that the Amendment Act and its Regulations will only be able to strengthen the accountability and transparency chain to an extent. The enforcement of clear reporting and feedback on recommendations, with consequences for failure, enhance accountability and will perhaps boost public confidence, in that those who abuse State resources will be held accountable. However, the country has always had a prosecuting authority, investigative bodies mandated to investigate corruption and fraud, and the means to recover stolen money. Clearly, this has not happened. The primary issue is the functionality of and cooperation between these institutions - also with matters related to the work of the AG.