

The logo consists of the words "Hogan" and "Lovells" stacked vertically in a black serif font, enclosed within a solid lime green square.

Hogan
Lovells

Zeal without understanding

A response to Paul O'Sullivan's allegations
relating to our work for SARS and others

by:

Lavery Modise, Chairman
Hogan Lovells (South Africa) Inc.

February 2018

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The letter

On 28 January 2018 we received a 19-page letter from Paul O’Sullivan of Forensics for Justice. In this letter and further correspondence he has made a significant number of unsubstantiated and incorrect allegations about some of our client work. Taken together, they represent a series of false and damaging statements and threats against my colleagues and me.

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**FORENSICS
FOR
JUSTICE**

MAKING SOUTH AFRICA
A BETTER PLACE FOR ALL

28 JANUARY 2018

In short, the substance of Mr O’Sullivan’s allegations are that because we have provided some legal advice to the South African Revenue Service (SARS), the office of the Minister of Police, and an official within the Directorate for Priority Crime Investigation (the Hawks), we must therefore be responsible for the entire conduct of SARS and its Commissioner, the conduct of the Minister of Police, and the conduct of the Hawk’s official. He claims that in doing so we have profited greatly from the work and deliberately extended it in order to further financially benefit.

Through an additional false leap of logic, Mr O’Sullivan believes we must be personally responsible for the undermining of our country’s criminal justice system and the entirety of state capture in South Africa. To help support his flawed arguments, he has taken selected facts from our work and overlaid them with extraordinary and false misrepresentations of motive. He claims we have acted on some cases when we have not. He even seems to hold us responsible for the contents of his bank account.

Mr O’Sullivan has also made a series of demands against us. These include demanding we confess to his allegations; suspending me as chairman of Hogan Lovells in South Africa; apologising for things we have not done; disclosing our client’s information to him, which he knows is protected by the Constitution and the law; being part of his “solution;” providing him with lawyers free of charge; and providing office space and computers to help support him.

With Mr O’Sullivan’s demands come increasingly desperate and escalating threats in his emails. He insists we are guilty of the claims he makes against us because he says so without evidence, and he believes silence is an admission of guilt. He threatens to block our emails to him – but continues to email us. He tells British peer Lord Hain to ignore any correspondence from us. He threatens to organize a boycott against us by our clients. He threatens to destroy us.

Mr O’Sullivan has drawn a comparison between us and the Nazis at Nuremberg. This, among all his allegations, is a repugnant comparison that I cannot allow to remain unchallenged. It is an insult of the most appalling kind and ignores the history of this firm. It is personally offensive.

I would hope it would be extremely hard for others to align themselves with Mr. O’Sullivan’s claims. I invite them not to do so.

What Mr O’Sullivan is doing is not campaigning. It is not democratic discourse. It is not discussion. It is blackmail – “do as I say or there will be consequences.” And it needs to be calmly and objectively dealt with as such.

We do not agree with Mr O’Sullivan’s views, and there is no doubt that his accusations and conclusions are wrong.

Since receiving his letter on 28 January we have taken time to assess carefully each of his allegations, and we are comfortable that they are false. We are also certain that our work was conducted professionally for our clients, within the correct timescales, and that the fees charged were appropriate for the work done.

Mr O’Sullivan states his qualifications as a certified fraud examiner. As a certified fraud examiner, he is obliged to operate within the code of professional ethics of that association and is expected to “obtain evidence or other documentation to establish a reasonable basis for any opinion rendered. No opinion shall be expressed regarding the guilt or innocence of any person or party.” We believe that his correspondence does not meet these standards, being short on evidence and long on expressions of guilt.

Should such evidence exist, then it should be submitted to the authorities and critically and fairly examined and dealt with in the appropriate forums.

We welcome any examination of our work, our conduct, and our fees by the appropriate competent authorities in our country including the Law Society of South Africa, the South African Parliament, the Auditor General, and the new President.

If there is no proof to support his claims, then Mr O’Sullivan should publicly withdraw all of his allegations and apologise and account to all for the damage he has caused.

We believe it is important to set out our own perspectives in as objective a manner as possible and to make those views public in order to provide informed balance to Mr O’Sullivan’s claims.

It is important to note in doing so that we, our individual partners, and our employees reserve all of our rights to take the appropriate action against Mr O’Sullivan and those who repeat his claims.

This is our response. These are the facts, and they strike right to the heart of Mr O’Sullivan’s attacks on the core principles that support our democracy.

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The facts



The true meaning of the rule of law

Mr O’Sullivan is a passionate crusader against corruption in our country. However, in reading his correspondence it is very clear that his claims against us are misguided and demonstrate a deep lack of understanding and respect for our Constitution and the rule of law. To quote U.S. Supreme Court Justice Louis Brandeis, “The greatest dangers to liberty lurk in the insidious encroachment by men of zeal, well-meaning but without understanding.”

Our work is and always has been to focus on supporting the rule of law in South Africa. This rule of law applies equally to all, from Mr O’Sullivan and me, to politicians and policemen, to spies and investigators, to government departments and officials, to corporations and campaigners.

The rule of law means listening to the evidence, adhering to attorney-client confidentiality, decent representation, judicial and attorney independence, and due process.

The rule of law is about making our country a place where you can rely on an independent legal system and judiciary to protect and uphold your rights as a citizen under the Constitution. It is the fundamental glue that binds our society together and is the difference between civilization and the rule of the mob.

It is deeply concerning and a direct threat to the values of our society and the Constitution that Mr O’Sullivan practises guilt by accusation and association – that if you advise a client who is unpopular or found guilty or has a particular political view or other agenda then you also must somehow be unpopular, guilty, or share that political view or agenda. This logic is medieval and misunderstands the role of lawyers in our society.

Arthur Chaskalson SCOB, former Chief Justice of South Africa, expressed the critical role that lawyers play in our society in November 2012:

“An independent legal profession is an essential guarantee for the promotion and protection of human rights and the establishment and maintenance of the rule of law... It is lawyers who advise members of the public of their rights and who bring cases to the court on their behalf.

Courts depend on the lawyers discharging this duty honestly and competently, and advancing the interest of their clients to the best of their ability. Without the assistance of lawyers, judges would not be able to discharge their constitutional duty to uphold the law without fear or favour.

It is in the public interest, and the interest of clients, that the culture of the legal profession should be rooted in the independence of the profession, and that lawyers should not be subject to outside influences or be concerned that if they take on a case for a particular client they will incur the hostility of the government or other powerful instances.”

As lawyers, our role is to advise on what the law says and to be independent but committed advocates for our clients to ensure that due process, as set by our Constitution

and Parliament, is followed. That means advancing or defending cases, as best we can in the time permitted, all the way through the different steps that our tried and tested judicial process has determined.

That can take time, and the road to truth and justice can often twist and turn and be vigorously combative. The courts are being called on to deal with the lawfulness or unlawfulness of the laws, procedures, and governance structures set up from time to time by the South African Parliament to address governance issues and the conduct of members of different units within the South African police services, and the use of legislative powers by individuals in office with respect to the conduct and disciplinary procedures applicable to the conduct of those employed by the state.

It is a sign of a healthy and thriving democracy that the rule of law and courts prevail, and not the whims or intrigue of individual politicians, policemen, spies, campaigners, or others.

Mr O’Sullivan makes a lot of us acting on behalf of the state. We have acted against it as well and our commitment to the community in our country is well-known and respected.

By way of some examples, we have for many years run a clinic that provides free legal advice and representation in civil claims to the victims of police brutality and to those who have been unlawfully arrested or detained.

We have acted pro bono for the South African Traders Association to oppose “Operation Clean Sweep” when 3,000 informal traders were removed from their trading posts in the inner city of Johannesburg.

We support a number of other efforts in the communities and have also worked with the Rule of Law Advisory team to create a platform to communicate to citizens the

understanding of the rule of law in South Africa. This is especially relevant when our country is faced with issues of corruption and state capture.

Added to this is our critical work in opposing state capture with the internationally respected South African Council of Churches (SACC) in working with the Unburdening Panel and the SACC National Convention in creating a dialogue to bring solutions to the crises facing the country in anchoring democracy, healing and reconciliation, economic transformation, and education.

Over the course of the last three years we have invested in South Africa more than 15,000 hours, worth more than ZAR 21 million (USD 1.75 million / GBP 1.26 million), by providing free legal advice to those who need it the most in our country – those who have suffered at the hands of the state, at the hands of policemen or criminals, and who have been the victims of state capture. This does not take into account the individual commitments, contributions, and investment made by our partners and employees, and their families, in financially supporting our corporate social responsibility initiatives and programmes.

Working with our colleagues outside of South Africa, our firm has invested more than ZAR 132 million (USD 11 million / GBP 8 million) in creating more than 120 new jobs in this country in the past three years for young people to support our firm globally.

Combined together, these are not the actions of those who are against our society. They are the actions of those who want it to be a place of freedom, where the rule of law prevails, and there is genuine opportunity that is attractive to all.

As we transition to a new government in our country it is even more important that the rule of law underpins all that we do.

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The law has prevailed.
As it should.



Our work for our clients

Mr. O'Sullivan has fundamentally misunderstood and confused himself over the differences between acting for a branch of the government, acting for an official of that organisation in the conduct of their governmental role, and acting on a personal basis for an individual.

For a non-lawyer it is easy for them to be seen as the same, but they are not. These are three different and entirely separate concepts that play a crucial role in the administration of justice in our country.

Our role in the court cases referred to in Mr O'Sullivan's letter was as professional legal advisers to advise SARS, the Minister of Police, and other officials of state in the delivery of their statutory and regulatory duties. We have never been the personal advisers and intimate confidantes to the individuals.

Mr O'Sullivan has also wrongly claimed that we were involved in cases involving Ivan Pillay and Pravin Gordhan. We were not.

Our work was related to employment, administrative, constitutional, and other legal matters and procedures, including inquiries and legal proceedings. We followed due process that was entirely consistent with the law and practices of our courts and in timescales that were often very rapid to honestly, ethically, and legally present the facts and evidence available from the policemen, spies, and investigators providing the evidence to the courts.

In doing so, we worked with, alongside, or against a number of other prominent local and international law firms and advocates. This is all on the public record.

In these circumstances, there can be no suggestion that we or others have undermined the judicial system. Far from it – the judicial system and the courts have worked well. Attorneys and advocates have assembled the cases, assembled the evidence, and made their arguments. The courts have looked at the cases for and against the individuals, and for and against the government officials and departments involved, and made their independent rulings based on the facts and the truth presented by the witnesses and other evidence.

It is also important to note that the courts did not seek to impose any financial sanctions on our clients for delays or other obstructions of justice.

The law has prevailed. As it should.

Mr O’Sullivan has questioned how we were instructed by our clients. He has alleged some form of improper relationship and questioned why a private law firm was handling these matters. The truth is simple.

We were recommended as legal advisers to act for the Minister of Police by advocate Mokhari SC based on advocate Mokhari’s experience of working with the firm and one of our partners, S.J. Thema, on other occasions. Up to that point, Mr Thema had no previous dealings with the Minister of Police. Advocate Mokhari worked on all elements of the cases with Mr Thema, alongside Advocate Nqckukaitobi in respect of constitutional matters.

SARS has been a long-standing client of the firm since long before commissioner Tom Moyane was appointed. We advised SARS on a wide range of matters under the leadership of Pravin Gordhan as well.

As to why a private law firm was instructed, where matters involve disputes between government offices, government officials, and ministers, the Office of the State Attorney (OSA) may be conflicted or able to only act for one side. Government offices, government officials, and ministers are able to instruct outside lawyers (where appropriate) to handle these matters when these natural conflicts of interest or duties occur for the OSA.

This use of private law firms is not untoward or unusual and is recognised by the Public Services Commission in its March 2016 report “Assessment on the Effectiveness and Efficiency of the Office of the State Attorney.” This report describes the unfortunate “dysfunctional” state of the OSA and its main clients – the South African police services and South African correctional services owing to capacity challenges.

In response to criticism of OSA litigators by judges, part of the proposed solution to assist the government was for the OSA to use private law firms in litigation proceedings, particularly for sensitive and highly complex matters or where there are conflicts of interest.

As well as OSA, the South African police services and Minister of Police may also instruct private attorneys themselves, and in doing so the costs incurred are audited and held accountable by the Auditor General.

The use of private law firms enables the government to draw on experience, in-depth knowledge of the law, and resources that lie outside of the public sector. It is a common feature of democratic governments around the world. In this, South Africa is no different.

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SUPREME COURT



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Concluding

Mr O’Sullivan has made, and continues repeating loudly and publicly, a series of allegations about us. We have looked at them, and they are self-evidently flawed and demonstrably false in their assertions and conclusions. Lord Hain has recently spoken of firing Mr O’Sullivan’s “bullets”. In this case they are blanks.

If Mr O’Sullivan has at his disposal the detailed evidence to substantiate the claims he asserts, then he should submit it to the appropriate authorities within a short time period or withdraw them.

We are disappointed that he chose not to contact us to establish the facts before launching his flawed campaign and that he has instructed Lord Hain to “disengage with these people.”

He repeatedly warns us not to try and gag him as he trumpets his allegations – when we have done nothing of the sort, just simply publicly told the truth and set out the reality.

We believe in the rule of law in a just and equitable society. The administration of the rule of law is founded on the core principles of the Constitution, which we all serve. In making his zealous accusations without understanding, Mr O’Sullivan is attacking the bedrock of the principles of our society.

State capture and corruption is repellent and we share with both Mr O’Sullivan and Lord Hain a desire to expose the truth in our society. It has to be done properly, so that there is no taint of special interests, financial gain, partisanship, or political influence. Under our new government we look forward to the fair and just examination of the facts.

Lavery Modise

Chairman

Hogan Lovells (South Africa) Inc

15 February 2018

