



Hogan  
Lovells

## Sunlight over shadow

An examination of Lord Hain's remarks to  
the House of Lords on 15 January 2018

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

January 2018



# 1

## Overview

On 15 January 2018, Lord Hain raised a number of issues in the UK's House of Lords regarding our employment law work for long-standing client the South African Revenue Service (SARS) in relation to two of its employees, Jonas Makwakwa and Kelly Ann Elskie.

Under the protection of parliamentary privilege, Lord Hain falsely described our work as a “whitewash” and sought to inaccurately portray the firm as a “willingly gullible or malevolent accomplice.” He has reported Hogan Lovells to the Solicitors Regulation Authority (SRA) in the UK and has inaccurately sought to align my limited work with the serious issues of state capture. His remarks were promulgated widely to media in the UK and South Africa in a pre-prepared statement. I reject his remarks and consider them to be the antithesis of our professional standards and conduct.

Lord Hain did not take up our offer to discuss any of those issues before his statement to the Lords. Had he done so, we would have welcomed the opportunity. He would then have known that our work in this area had already been reviewed and extensively discussed in public in South Africa during 2017, culminating in an invitation for me to make a statement to the cross-party and independent South African Parliament Standing Committee on Finance on 5 December 2017. A copy of my evidence to the Parliamentary Committee is attached as Appendix A.

Instead, Lord Hain's statement appears to rely heavily on an article published in the press in South Africa on 21 November 2017. I fully addressed the

accusations made in that article in my evidence to the Parliamentary Committee and clearly demonstrated at that time that much of the content of the article was simply wrong or uninformed.

It is disappointing that Lord Hain appears to have either deliberately or accidentally sought to mislead as to the facts of our limited work in this instance for SARS. When my colleague in London sought to brief other members of the House of Lords before Lord Hain made his claims, Lord Hain dismissed those efforts as “a hostile act,” and his correspondence with us wound up on the pages of a South African news website in a remarkably short period of time. This same website appears to be the main source of the information shared by Lord Hain in the House of Lords.

I acknowledge and thank Lord Hain for his work over many years in support of South Africa and share his concern regarding corruption and state capture in our country. His work and dedication to the people of South Africa is without question. In many ways we are his natural allies, not his opponents. We have championed the same causes. This is what makes his actions and lack of engagement with us doubly disappointing and saddening.

Along with my colleagues in London, we will work closely with the SRA and look forward to presenting our information to them.

I am a senior director and chairperson of Hogan Lovells in South Africa, with 28 years' experience. I previously acted as a judge in the Labour Court in 2002, 2004, and 2013. I represent clients in all courts up to the Supreme Court of Appeal and the Constitutional Court. Throughout my career I have conducted myself with professionalism and probity.

I have long taken the position that it is better to engage in constructive dialogue and bring together different and opposing views in order to find workable solutions. The understanding of different perspectives helps build better societies.

I personally commit to many hours of pro bono work to meet and advise our people, clients, charities, and those in need. I am proud to work closely with the Teddy Bear Foundation Court Preparation Programme, where

child victims of sexual violence enter a programme to prepare them to give evidence in court. With my colleagues, we have supported more than 100 children in the Soweto court, taking them through the workings of the criminal justice system and helping them to give evidence against their perpetrators.

In making his statements in the House of Lords about my firm and my work, conducting press briefings, and promoting the media coverage on social media, Lord Hain has used his parliamentary privilege to spread and perpetuate allegations about me and my firm that are simply untrue and that, if repeated elsewhere, would be undoubted grounds for legal action.







# 2

A brief summary of  
our work with SARS

Full details of our work for SARS are set out in my evidence to the South African Parliament in Appendix A. However, for the sake of completeness and as a brief summary, the key highlights are as follows:

- In September 2016 I was asked by SARS to conduct an independent investigation into allegations against two employees, Jonas Makwakwa and Kelly Ann Elskie, in relation to their employment contracts.
- At the time, Jonas Makwakwa had been suspended from SARS, and both he and Kelly Ann Elskie were under investigation for the receipt of suspicious and unusual payments as a result of an investigation carried out by the South African Financial Intelligence Centre.
- Alongside our employment-related work, PwC was conducting an investigation on behalf of SARS in to the tax evasion aspects of the alleged payments, and the South African Directorate for Priority Crime Investigation (DPCI or Hawks) was investigating any criminal corruption.
- Under its terms of reference, Hogan Lovells produced a report for SARS on the employment contract issues. One of those recommendations was that disciplinary action should be taken against Jonas Makwakwa. No action was recommended against Kelly Ann Elskie.
- SARS took our advice and followed its own internal disciplinary process and charged Jonas Makwakwa for contravening his suspension condition and failure to disclose an external business interest. A hearing was convened and chaired by an independent chairperson, Terry Motau SC. The conclusion of the disciplinary tribunal was to acquit Jonas Makwakwa of breaches of his employment by SARS. Hogan Lovells had no involvement in the independent chairperson's decision.
- None of the work undertaken by Hogan Lovells or the disciplinary tribunal has exonerated Jonas Makwakwa of the criminal and tax allegations. To our knowledge those investigations are still ongoing, and should they find that there has been an offence or contravention of tax legislation, then SARS can take full disciplinary action against Jonas Makwakwa and Kelly Ann Elskie.
- The release of our report and the full terms of reference for our work are subject to client/attorney privilege, and it is for SARS to decide with a sub-committee of the Parliament what documents should be released to the Parliament and the wider public. Hogan Lovells would welcome the release of those documents.



# 3

Sunlight and the  
simple facts



As a firm of solicitors, we put the rule of law first and foremost, and all of us acknowledge that truth and democratic discourse are an essential part of upholding the rule of law. U.S. Supreme Court Justice Louis Brandeis argued that “sunlight is said to be the best of disinfectants” and that “behind every argument is someone’s ignorance.”

Taking both of Justice Brandeis’ comments to heart, we have therefore produced this brief analysis that details the facts in response to Lord Hain’s allegations, and we are making them public while still meeting our professional responsibilities to our client.

My preference would be to do this privately, but since Lord Hain has so widely and regrettably publicised his statement, we feel compelled to respond equally publicly.

Lord Hain’s statement to the House of Lords posed a number of questions about our work. Below we take each in turn and set out the facts of the situation while providing a brief commentary on Lord Hain’s question and our response.

**Hain: Why did Hogan Lovells accept this mandate while knowing about Tom Moyane’s corrupt Zuma/Gupta agenda?**

**Facts:** SARS has been a client of the firm since 2004, and over the years we have provided for them a mixture of advice, covering employment law, tax litigation, and other areas of advice. This long predates Tom Moyane’s role at SARS. Our instructions to investigate Jonas Makwakwa and Kelly Ann Elskie came directly from Tebogo Mokoena, Human Capital Executive, and Ngwako Rapholo, Senior Employee Relations Manager.

**Comment:** To characterise our taking on this matter as being supportive of Tom Moyane’s “corrupt Zuma/Gupta agenda” is stretching the fabric of facts beyond breaking point.

**Hain: Why did Hogan Lovells allow itself to be controlled by Moyane, including allowing him glibly to alter the terms of reference to suit his agenda at various points in this sorry saga?**

**Facts:** We were not instructed by Tom Moyane. The terms of reference we operated under were limited to identifying whether any misconduct had been committed by Jonas Makwakwa and Kelly

Ann Elskie as employees of SARS in receiving those monies. Once finalised at the start of the engagement, those terms of reference did not change.

SARS issued a press release on 30 October 2017 that implied that we had investigated the Financial Intelligence Centre’s (FIC) allegations and said we had recommended that disciplinary action be taken against Jonas Makwakwa. Only the latter was correct; and we issued our own press release on 3 November 2017 that made it clear that we had not been instructed to investigate the FIC allegations, and the scope of our work was limited to identifying whether any misconduct had been committed by Jonas Makwakwa and Kelly Ann Elskie as employees of SARS.

On 27 November SARS issued another press release that essentially stated that we had investigated the FIC transactions. We had no control or influence over that statement and were obliged to keep repeating what we said on 3 November.

My evidence to Parliament confirmed and clarified these points.

**Comment:** We reject Lord Hain’s allegations that we were in any way controlled by Tom Moyane, and if there were such pressure, we would have resigned the work.

Hain: Why has Hogan Lovells failed to release its documents – including the original terms of reference, its final report, and any other relevant documentation which would help clear its name – to the South African Parliament?

**Facts:** Our report and related documents, including our terms of reference, are subject to client/attorney privilege, and SARS has not waived privilege. This is not something over which Hogan Lovells has any choice.

When I appeared before the South African Parliament Standing Committee on Finance it was agreed that a sub-committee of Parliament and SARS would be set up to decide on what basis or what parameters SARS would relinquish its legal privilege and make the necessary documents available to Parliament. This committee was to meet in January 2018. Hogan Lovells is not party to this committee or its decisions, but it is taking matters forward in accordance with the law.

**Comment:** Professional privilege is the cornerstone of the client/attorney relationship and a fundamental element of the rule of law. Given Lord Hain's own use of Parliamentary privilege, it is deeply surprising that he appears to be unaware of this, and it would be unedifying if he were suggesting that we break the law. Hogan Lovells will follow the instructions of the sub-committee and in any event has no objection to SARS waiving its privilege.

Hain: What has it [Hogan Lovells] got to hide?

**Facts:** Nothing. As stated above, the disclosure of the report is something for the sub-committee of Parliament and SARS to decide. As a matter of fact, I accepted the invitation to present my evidence to the South African Parliament and very much welcomed the opportunity to do so.

**Comment:** As has been stated in my evidence to Parliament, our report does not exonerate Jonas Makwakwa and does not exonerate him from possible charges that could result from the outcome of the investigations into his tax affairs conducted by PwC as well as the criminal investigation conducted by the Hawks.

We advised SARS that if the tax and criminal investigations conducted by others revealed that an offence had been committed, SARS would need to bring disciplinary proceedings against Jonas

Makwakwa. We have never advised and have not been asked to advise on whether Jonas Makwakwa is guilty of any criminal/tax offences and have not exonerated him of any.

Hain: How much money did Hogan Lovells get from SARS for this investigation?

**Facts:** We can only disclose this information with the permission of SARS.

**Comment:** Our work involved taking evidence and gathering the necessary information, as well as reviewing the relevant legal issues and providing advice to SARS. All of our work is transparent to our client, and if they choose to make it public, then we will help them do so.

Hain: Will Hogan Lovells pay back that fee, if not to SARS then at least to South African charities combating the poverty it has helped deepen?

**Facts:** No.

**Comment:** Lord Hain has failed to make any reasonable case as to why this should be the case. Our instructions were taken in good faith for a longstanding client, our recommendations have been acted on by SARS, and our work has been subject to independent scrutiny by the South African Parliament. It is for them to decide what should happen. The notion that our work has deepened poverty in South Africa is easily and clearly contradicted by the work my colleagues and I have carried out for many years in this country.

Hain: Why has Hogan Lovells allowed itself to be used to undermine South Africa's revenue collection agency?

**Facts:** As stated above, SARS has been a client of the firm since 2004, and over the years we have provided for them a mixture of advice covering employment law, tax litigation, and other areas. This long predates Tom Moyane's role at SARS. Our instructions to investigate Jonas Makwakwa and Kelly Ann Elskie came directly from Tebogo Mokoena, Human Capital Executive, and Ngwako Rapholo, Senior Employee Relations Manager. Our work for them was and has been in good faith.

**Comment:** We reject the idea that we have been used to undermine SARS. We stand by both the quality and probity of our work and continue to do so.



Hain: What is the relationship between the South African chair of Hogan Lovells, Lavery Modise, and the commissioner of SARS, Tom Moyane?

**Facts:** There is no relationship. I first met Tom Moyane on 15 September 2016 and it was in relation to our work. I met him at two further meetings in March and June 2017. Others were always present from SARS and/or Hogan Lovells and he left our meetings before they had ended.

**Comment:** I am personally affronted by Lord Hain's insinuation in his statement and tone of questioning that there may be any form of improper relationship with Tom Moyane. I am delighted to disappoint his Lordship on that score.

Hain: Some of the suspicious transactions received by Makwakwa were in U.S. dollars. What onus does this place on regulatory authorities in the U.S. – and, indeed, Hogan Lovells, as a firm that is also based in the U.S. – to report and investigate?

**Facts:** To our knowledge, none.

**Comment:** The investigation into the nature of the “suspicious transactions” was already in the hands of the Hawks by the time we were instructed by SARS. We are not aware of the current status of their investigation of Jonas Makwakwa.

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# 4

Concluding







In 1,600 words, Lord Hain made a series of statements to the British House of Lords that are based on a combination of unfounded allegations, inflammatory statements, and demonstrable lack of knowledge.

However, Lord Hain did say in his closing comments that “any work for any state agency or state-owned enterprise must be undertaken only with total integrity.”

On this I agree. And we stand by our work as meeting precisely that standard.

**Lavery Modise**

Chairman

Hogan Lovells (South Africa) Inc.

22 January 2018

# Appendix A

## Standing committee on finance

In re: Mr Mashudu Jonas Makwakwa: 5 December 2017

### Evidence presented by Lavery Modise

Good Morning Chairperson and all Honourable Members of the Committee

1. First I want to thank the Committee for inviting me to this session and giving me the opportunity to address you on this matter. I value and cherish the importance of the rule of law, transparency and accountability. I believe in the values of an open and democratic society as enshrined in the Constitution of the Republic of South Africa.
2. I am appearing before this Committee by invitation of the Chairperson by letter of 30 November 2017. The letter acknowledges that because of my firm's professional relationship with the South African Revenue Service ("SARS") in as far as the matter under your investigation is concerned, I may be obliged to answer certain questions and also not obliged to answer certain other questions, taking into account that professional relationship.
3. I have also had the opportunity to interact with Mr Frank Jenkins of Parliament's Legal Services Unit regarding the legal parameters of my participation in these proceedings. He too, as an advocate of the High Court of South Africa, appreciates that as a result of the client/lawyer relationship that my firm has with SARS I am constrained in disclosing what may amount to confidential and privileged information, instructions and advice that was generated in the discharge of my professional duties to my client.
4. I will answer questions from the Honourable members of the Committee to the extent that I do not violate my client's right to have its communications with me kept confidential and protected by legal professional privilege. This is a right that is protected in law and which is recognised by the provisions of section 16 of the Powers, Privileges and Immunities of Parliament and Provincial Legislatures Act, 4 of 2004.
5. At Hogan Lovells we take seriously our responsibilities as citizens and to our clients, and are committed to delivering sound advice with integrity. We also believe that it is important to the continuation of the rule of law that organs of state should have access to the best advice, and that leading professionals should be able to work with them. SARS are a long-standing client of the firm.
6. Acting with the highest level of integrity is paramount to our business and the core of our vision and values. We are bound by the Attorneys Act of 1979 which encompasses a code of ethics which requires this of us. Should we be suspected or found not to have lived up to the high standards of ethics as professionals we should be reported to the Law Society which oversees the attorney's profession and holds us accountable.



7. I firmly believe that we acted in this case with full propriety, in accordance with our instructions and our wider duties. I want to take this opportunity to outline our role and our actions in the matter before us.

#### Our instruction

8. I am a senior director and chairperson of the firm with 28 years' experience. I have acted as a Judge in the Labour Court in 2002, 2004 and 2013. I know that the legal field requires acting with the highest standard of fidelity, integrity and ethics.
9. I was formally instructed by SARS in October 2016 to conduct an independent employment investigation into allegations against Mr M Jonas Makwakwa and Ms Kelly Ann Elskie in relation to their employment contracts. At that time Mr Makwakwa was under suspension as a result of the Financial Intelligence Centre (FIC) Report provided to SARS in May 2016. This suspension commenced on 15 September 2016, and was already in place when we were first instructed.
10. Our instructions arose from a report by the FIC to SARS which had identified various financial transactions involving Makwakwa and Elskie which the FIC deemed to be suspicious or unusual.
11. Given that the Directorate for Priority Crime Investigation ("DPCI") or ("Hawks") were already investigating complaints related to crimes contemplated under the Prevention and Combating of Corrupt Activities Act, 12 of 2004 ("PRECCA") and Prevention of Organised Crime Act, 121 of 1998 ("POCA") under DPCI Enquiry 03/06/2016, and that suspected crimes of tax evasion and other contraventions of the Tax Administration Act (28 of 2011) fell squarely within SARS's mandate to investigate, we recommended that these two categories (and related

contraventions) be investigated by the Hawks and SARS respectively. SARS engaged the auditing and tax advisory firm PWC to investigate the tax related matters. Hogan Lovells was only to investigate whether Makwakwa and Elskie had contravened any internal policies and/or the PFMA when effecting certain payments and whether certain ad hoc payments to Makwakwa by SARS were irregular. I advised further that should the other investigations by the Hawks and PWC/SARS find them guilty of any offence, that would constitute misconduct which our firm would pursue against them at the appropriate stage.

12. I hasten to add therefore that any suggestion that Hogan Lovells decided not to investigate any aspect contained in the FIC Report is fallacious. To the contrary Hogan Lovells recommended that investigations be conducted by the bodies that enjoy statutory powers and the expertise to do so.
13. PWC was instructed to investigate the source of funds for each of the transactions and, in a report which was provided to Hogan Lovells, PWC concluded that they could not confirm that the source and nature of the funds for the majority of the transactions were improper. Allegations under this heading were put to Makwakwa during our investigation. However, Makwakwa challenged Hogan Lovell's jurisdiction to question him further seeing that PWC had not provided a definitive report. On the basis of that report and the information that was available to us at the time, we advised that a prima facie case of misconduct could not be made out in relation to the transactions and therefore that a finding of misconduct could not be made.

14. The criminal aspects of the financial transactions were always outside our scope, as determined by our terms of reference. Our recommendation was that they be not investigated by us but by the Hawks and SARS. This was so because in our capacity as adviser to the employer, we did not have the power to subpoena bank records or witnesses in the way that criminal investigators do.
15. We advised SARS that we would only be able to advise on whether any further disciplinary action against Makwakwa and Elskie was appropriate in relation to any criminal or other charges upon completion of the necessary investigations by the Hawks (criminal investigation) and PWC (tax investigation). Those investigations are, to our knowledge, either on-going or in the hands of third party professionals who are dealing directly with SARS. We have not had sight of any report from PWC in this regard.
16. As a result of our investigation in the category reserved for us, we produced a report which contained recommendations for the management of SARS in relation to employee matters. One of those recommendations was that disciplinary action should be taken against Makwakwa for non-disclosure of external business interests and contravention of his suspension conditions. No action was recommended against Elskie.
17. I reiterate that we gave our client (SARS) the best advice in the circumstances. Any suggestion that we colluded with SARS to shield the two employees from any investigation is misplaced and ignorant of the proper process as dictated by law.

#### Parallel investigations

18. It must be appreciated that had Hogan Lovells proceeded with investigations under the other categories of investigation

this would have constituted parallel investigations. That would have been most undesirable.

#### Outcomes

19. SARS accepted our advice in regard to the employer/employee of investigations and followed its own internal disciplinary procedures and charged Makwakwa for contravening his suspension condition and failure to disclose an external business interest. A hearing was convened and chaired by an independent senior counsel, Advocate Terry Motau SC. The findings of that internal enquiry delivered to us on 13 October 2017 acquitted Makwakwa of both charges.
20. The Motau SC findings do not exonerate Makwakwa from possible charges which could result from the outcome of the investigation into his tax affairs (being investigated by PWC) as well as the criminal investigation (being conducted by the Hawks). Those investigations continue to our knowledge. We are not aware of any reports in this regard whether any of these investigations have been concluded.
21. Should the tax and criminal investigations and the money laundering investigation reveal that an offence had been committed SARS would need to bring disciplinary proceedings against Makwakwa and Elskie. We advised in this regard as follows: "Should it be established that Makwakwa and Elskie have committed a crime as defined in PRECCA and if the said employees are still employed by SARS, the disciplinary action must be taken against them in addition to any criminal offences which may be uncovered by the DPCI. At the appropriate stage, Hogan Lovells shall assist with all disciplinary action if requested subject to compliance with [SARS's] procurement policies."



22. In respect of the tax violations complaint we advised as follows: “Should the investigation find that there has indeed been contravention of tax legislation or commission of a tax offence, this would constitute misconduct on the part of the employee. It is part of Hogan Lovells’s mandate to assist [SARS] to institute disciplinary action against the employee(s) concerned.”
23. We have therefore not yet been asked to advise whether Makwakwa and Elskie are guilty of these offences and/or to initiate disciplinary proceedings against them. Hogan Lovells have not exonerated them of any charges because these investigations are still pending.
24. I want to be clear that my and Hogan Lovells’ involvement in this matter has been limited and is simply as set out in this statement. It is usual for matters like this, which relate to tax, criminal and employment matters to name but three, to have a variety of advisers and professionals who have clear and defined roles which do not overlap. You will, I hope, appreciate that in these circumstances I can only comment on areas where we have been instructed and involved.

## Conclusion

25. I hope that I have managed to clarify any uncertainty about Hogan Lovells’ involvement and its mandate in these investigations. Unfortunately, and in keeping with sound legal and professional principles and ethical conduct, I cannot divulge confidential and privileged communications between Hogan Lovells and its client. SARS has not waived its rights in this respect and we are not at liberty to disregard our client’s rights. We also hold ourselves to the ethical standards set by the legal profession.
26. However, I would like to reiterate that our part in the investigation does not exonerate Mr Makwakwa of all the allegations tabled in the FIC report. To the best of my knowledge, the criminal and tax investigations are in progress and are conducted by the relevant bodies. Should the investigations find that there has been indeed an offence or contravention of tax legislation, disciplinary action must be taken against Makwakwa and Elskie.

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## Lavery Modise

Chairman

Hogan Lovells (South Africa) Inc.

4 December 2017

