

BEFORE THE COMMISSION OF INQUIRY INTO TAX ADMINISTRATION AND GOVERNANCE  
BY SOUTH AFRICAN REVENUE SERVICE

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**AFFIDAVIT**

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I, the undersigned,

**LAVERY SECHABA MODISE**

state under oath that:

**1. INTRODUCTION**

- 1.1 I am a major male, an admitted attorney of the High Court of South Africa and a partner (and the former chairperson) of Hogan Lovells (South Africa) Incorporated ("Hogan Lovells"), a firm of attorneys with its principal place of business at 12<sup>th</sup> Floor, 140 West Street, Sandton. I have been an admitted and practicing attorney for over 28 years.
- 1.2 The facts contained herein are within my personal knowledge, unless the contrary clearly appears from the context, and are further both true and correct.
- 1.3 I depose to this affidavit in response to submissions made to the Commission of Inquiry Into Tax Administration and Governance by South African Revenue Service (the "Commission") by Corruption Watch, a non-profit civil society organisation (the "Corruption Watch Submissions").<sup>1</sup>

**2. FORM OF THE CORRUPTION WATCH SUBMISSIONS**

- 2.1 The Commission invited interested persons to make written submissions to the Commission in relation to matters within its terms of reference.<sup>2</sup> The Commission required such submissions to be concise, succinct and under cover of a brief summary. Any facts to be placed before the Commission must be confirmed by affidavit.
- 2.2 The Corruption Watch Submissions take the form of a cover letter, together with documents, letters and affidavits attached thereto. There are no allegations made against Hogan Lovells in any of the affidavits. The allegations made against Hogan Lovells are contained in the cover letter and I will accordingly respond to them as submissions and not as facts deposed to under oath.

**3. THE MAKWAKWA INSTRUCTION**

- 3.1 The South African Revenue Service ("SARS") has been a client of Hogan Lovells (and its predecessors) for more than 12 years. Hogan Lovells is one of SARS' panel attorney firms. Our professional relationship with SARS is (and was) governed by service level agreements concluded with (and renewed by) SARS from time to time. These service level agreements cover, amongst other things, the nature of the work we are contracted to do, the fees we are permitted to charge and our professional and ethical duties owed to SARS, including strict confidentiality undertakings.

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<sup>1</sup> The Corruption Watch Submissions are dated 31 July 2018, but which was made public on 3 September 2018  
<sup>2</sup> Government Notice 612 of 18 June 2018

3.2 I am a labour lawyer. Hogan Lovells, however, does not only perform labour work for SARS, we also represent SARS in respect of tax payer disputes and other legal work.

3.3 On 15 September 2016, Commissioner Tom Moyane suspended Mr Jonas Makwakwa on full pay. I attended a meeting at SARS, together with Ms Jean Ewang (a partner at Hogan Lovells) later that day and was instructed in the matter by SARS' Employment Relations Department.<sup>3</sup>

3.4 Thereafter we prepared a letter of engagement that stipulated what we were instructed to do and how we intended doing it. On 29 September 2016, we dispatched our Mandate Letter to SARS and it was signed by Commissioner Moyane on 4 October 2016 as the person to whom Mr Makwakwa reported.<sup>4</sup>

#### 4. THE FIC REPORT

4.1 Our instructions, and the suspension of Mr Makwakwa, arose out of a report presented to Commissioner Moyane by the FIC<sup>5</sup> (the "FIC Report").<sup>6</sup>

4.2 The FIC Report was sent to Commissioner Moyane pursuant to section 40(1)(aH) of FICA.<sup>7</sup> SARS was just one of 9 investigative, enforcement or prosecutorial governmental agencies listed in section 40(1) of FICA to which the FIC was compelled to provide the FIC Report. Section 41 of FICA provides that the information contained in the FIC Report is confidential and may not be disclosed, save in certain circumstances.<sup>8</sup>

4.3 The FIC Report identified 76 cash transactions relating to Mr Makwakwa that it classified as suspicious and wanted investigated. The FIC put 4 requests (the "4 FIC Requests") to SARS for investigation<sup>9</sup>:

- (a) Request A – whether the funds received by Mr Makwakwa and Ms Elskie constituted payment of proceeds of crime arising from corrupt activities as defined in PRECCA<sup>10</sup>;
- (b) Request B – whether Mr Makwakwa and Ms Elskie committed tax evasion and other contraventions of the Tax Administration Act<sup>11</sup>;
- (c) Request C – whether Mr Makwakwa and Ms Elskie effected payments in contravention of internal policies and/or the PFMA<sup>12</sup>; and

<sup>3</sup> We were also instructed to advise SARS on matters relating to Ms Kelly-Anne Elskie, another employee of SARS at the time

<sup>4</sup> A copy of our Mandate Letter is attached as annexure "HL1"

<sup>5</sup> The Financial Intelligence Centre created under the Financial Intelligence Centre Act, Act No. 38 of 2001 ("FICA")

<sup>6</sup> The FIC Report consists of 6 pages and several files of supporting documentation. The 6 pages of the FIC Report has been made public through various sources and is thus in the public domain. I enclose the public 6 pages of the FIC Report as annexure "HL2"

<sup>7</sup> Section 40(1)(aH) provides that: "*Subject to this section, the [FIC] must make information reported to it, or obtained by it under this Part and information generated by its analysis or information so reported or obtained, available to – the South African Revenue Service...*" (my emphasis)

<sup>8</sup> Section 41 provides that: "*No person may disclose confidential information held by or obtained from the [FIC] except (a) within the scope of that person's powers and duties in terms of any legislation; (b) for the purpose of carrying out the provisions of this Act; (c) with the permission of the [FIC]; (d) for the purpose of legal proceedings, including any proceedings before a judge in chambers; or (e) in terms of an order of court.*"

<sup>9</sup> As stated in paragraph 6 of our Mandate Letter, the FIC Report did not "...come to any definitive conclusions on whether [Mr] Makwakwa and [Ms] Elskie committed offence(s). Rather, the [FIC] report provides data of suspicious activity which requires further investigation and analysis prior to a conclusion being reached regarding culpability." (Our Mandate Letter annexure "HL1")

<sup>10</sup> The Prevention and Combating of Corrupt Activities Act, Act No. 12 of 2004

<sup>11</sup> Act No. 28 of 2011

<sup>12</sup> The Public Finance Management Act, Act No. 1 of 1999

(d) Request D – whether any of the alleged conduct of concealment and disguising of the true source of the funds constituted acts of money laundering as defined in POCA<sup>13</sup>.

## 5. OUR MANDATE LETTER

5.1 SARS sought our legal advice on what it was permitted to do within its statutory powers in dealing with the 4 FIC Requests, with our assistance where possible.

5.2 We accordingly set out how SARS (and other governmental agencies) had to deal with the 4 FIC Requests:

(a) Request A – the request was to determine whether a crime was committed under PRECCA. We advised that SAPS<sup>14</sup> had to investigate this as it was not within the powers of SARS to do so<sup>15</sup>. An investigation in this regard already commenced<sup>16</sup> under the auspices of Colonel Heap of the Hawks.<sup>17</sup> As such, SARS could not investigate whether crimes were committed under PRECCA<sup>18</sup>;

(b) Request B – the request was to determine whether Mr Makwakwa or Mr Elskie committed tax evasion. This is quintessentially what SARS is empowered to do.<sup>19</sup> We advised, however that this aspect of the investigation had to be conducted by SARS in its capacity as the revenue service and not as employer.<sup>20</sup> We did say that if there was tax evasion, then this would constitute employment misconduct for which the two employees could be disciplined<sup>21</sup>;

(c) Request C – there were two parts to the request to determine whether the monies received by Mr Makwakwa were in breach of the PFMA. *Firstly*, there were payments from Biz Fire Worx<sup>22</sup> and *secondly*, there were *ad hoc* payments by SARS to Mr Makwakwa:

(i) SARS could not investigate breaches of the PFMA by other governmental agencies.<sup>23</sup> We advised that the payments from Biz Fire Worx had to be investigated by SAPS, but that if an offence was committed, then Mr Makwakwa could be charged with employment misconduct<sup>24</sup> and

(ii) if the *ad hoc* payments by SARS to Mr Makwakwa revealed breaches by SARS of the PFMA or its internal policies, then this would also be employment misconduct for which Mr Makwakwa could be charged.<sup>25</sup>

<sup>13</sup> The Prevention of Organised Crime Act, Act No. 121 of 1998

<sup>14</sup> South African Police Services

<sup>15</sup> Paragraph 15 of our Mandate Letter

<sup>16</sup> Paragraphs 16 and 17 of our Mandate Letter

<sup>17</sup> The "Hawks" is the colloquial term for the Directorate of Priority Crime Investigation of the SAPS

<sup>18</sup> It is SARS' role to support other governmental agencies in the investigation of money laundering and corruption as part of a Multi-Agency Working Group. See in this regard the SARS' website where this is dealt with at <http://www.sars.gov.za/TargTaxCrime/WhatTaxCrime/Pages/SARS-and-the-Criminal-Justice-System.aspx>

<sup>19</sup> Paragraph 25 of our Mandate Letter

<sup>20</sup> Paragraphs 25 and 27 of our Mandate Letter

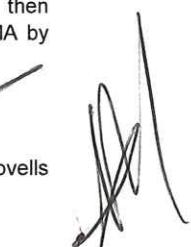
<sup>21</sup> Paragraph 28 of our Mandate Letter

<sup>22</sup> A company with which Mr Makwakwa had an association and from which it appeared that money emanating from the Department of Water Affairs and Forestry ("DWAF") made its way to Mr Makwakwa after a series of money transfers. See paragraph 30.1 of our Mandate Letter

<sup>23</sup> SARS could not, for example, investigate whether the money paid by DWAF to service providers, which then ultimately made its way to Mr Makwakwa through intermediary companies, amounted to a breach of the PFMA by DWAF. SARS simply does not have that power

<sup>24</sup> Paragraphs 30.1, 34 and 36 of our Mandate Letter

<sup>25</sup> Paragraphs 30.2, 32 and 33 of our Mandate Letter



(d) Request D – as to whether there were any crimes committed under POCA, we advised that this too had to be investigated by SAPS.<sup>26</sup>

5.3 As a result, there were three investigations:

- (a) the Hawks had to continue its investigation into crimes under POCA and PRECCA;
- (b) SARS had to determine whether there was tax evasion; and
- (c) the sources of funds had to be determined and because of the forensic expertise required, we instructed PwC to assist in this regard. From that, Hogan Lovells had to determine whether there was employment misconduct capable of discipline.

5.4 The form and competency of the three investigations were dictated by law. Hogan Lovells did not design our Mandate Letter to limit the investigations or to avoid them. Any impression created that Hogan Lovells was instructed to investigate the FIC Report as an entity independent of SARS, is wrong.

## 6. **WHAT WE DID**

6.1 At the time, Mr Makwakwa was SARS' Chief Officer: Business and Individual Taxes. It was a very senior position. Any investigation into his tax affairs would be done by persons junior to him at SARS, potentially resulting in a lack of impartiality. SARS accordingly sought our advice as to whether its tax evasion investigation could be outsourced. We took Senior Counsel's opinion and advised that SARS could outsource the tax investigation to PwC.<sup>27</sup> SARS then instructed PwC to conduct such a tax evasion investigation on its behalf.

6.2 In order for Hogan Lovells to determine whether any of the 76 cash transactions in the FIC Report resulted in employment misconduct, we needed to investigate the sources of funds. This required forensic skills. We instructed PwC to assist with such an investigation.

6.3 Mr Makwakwa was asked to provide an explanation for the 76 cash transactions in the FIC Report, totalling R785 130.00 over a 6 year period. He did so in his attorney's letter on 4 November 2016.<sup>28</sup> The transactions fell into 5 categories and Mr Makwakwa explained them as follows:

- (a) payments from SARS – during 2014 – 2015 Mr Makwakwa received R334 459.05 from SARS (which were labelled as "*irregular and ad hoc payments*").<sup>29</sup> These he explained to be reimbursement for business travel expenses. Further amounts paid to him were for encashment of annual leave.<sup>30</sup>
- (b) payments from Biz Fire Worx – he admitted receiving three payments totalling R480 000.00 during April and May 2015 as part-repayment of a loan and explained where the money came from.<sup>31</sup> He admitted that he was a director of

<sup>26</sup> Paragraphs 37 and 38 of our Mandate Letter

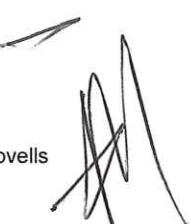
<sup>27</sup> PricewaterhouseCoopers Advisory Services (Pty) Ltd

<sup>28</sup> The letter is attached marked "HL3" (duly redacted as disclosed previously)

<sup>29</sup> Paragraph 28 of annexure "HL3"

<sup>30</sup> Paragraph 30 of annexure "HL3"

<sup>31</sup> Paragraphs 33-43 of annexure "HL3"



Biz Fire Worx because he was previously asked for financial assistance and his role evolved from there, but that his directorship was declared to SARS;<sup>32</sup>

- (c) sale of immovable property – he purchased a vacant stand in Venda in August 2012 for R89 000.00 and sold the stand to a construction company<sup>33</sup> for R250 000.00, payable in instalments from March 2016.<sup>34</sup> The instalments were mostly paid in cash and deposited into his FNB personal bank account;<sup>35</sup>
- (d) sale of movable property – he deposited US\$13 500.00 into his FNB personal bank account. He explained that this money came from his father in Zimbabwe who gave him 25 cattle as recompense for not contributing to his upbringing.<sup>36</sup> The cattle were sold for US\$14 200.00<sup>37</sup> and US\$700.00 was paid to the persons who took care of the cattle.<sup>38</sup> The money was brought into South Africa by a relative of Mr Makwakwa;<sup>39</sup> and
- (e) payments from friends and family – he explained that his father provided him with financial assistance from time to time.<sup>40</sup> Also, as the eldest son, he collected money from family members for family projects and deposited the money into his FNB personal bank account.<sup>41</sup>

6.4 PwC completed its investigation into the sources of funds and presented Hogan Lovells with its report, which we then considered to determine whether there was any employment misconduct. We presented our final report to SARS on 16 May 2017 ("Our Report")<sup>42</sup> in which we advised that:

- (a) the Hawks had not completed its investigation into crimes under POCA or PRECCA.<sup>43</sup> As such, no employment misconduct charges could be pursued for this at the time, but if that investigation revealed such crimes later, then Mr Makwakwa should face disciplinary charges (requests A and D above);
- (b) the tax evasion investigation was dealt with separately (between PwC and SARS) and Hogan Lovells was not given a copy of that PwC report due to confidentiality under the Tax Administration Act. At that time, the tax investigation had not revealed any outcome<sup>44</sup> (request B above);
- (c) the PwC sources of funds report was inconclusive on many of the transactions as PwC was unable to investigate beyond the answers given and documents obtained.<sup>45</sup> We stated that "*SARS in its capacity as employer [was] limited in its ability to investigate an employee's sources of income. [SARS was] also limited in*

<sup>32</sup> Paragraph 35 of annexure "HL3"

<sup>33</sup> Rym Construction Enterprises

<sup>34</sup> Paragraph 44 of annexure "HL3"

<sup>35</sup> Paragraph 45 of annexure "HL3"

<sup>36</sup> Paragraphs 48 and 48.1 of annexure "HL3"

<sup>37</sup> Paragraph 48.2 of annexure "HL3"

<sup>38</sup> Paragraph 48.3 of annexure "HL3"

<sup>39</sup> Paragraph 48.2 of annexure "HL3"

<sup>40</sup> Paragraphs 51 and 51.1 of annexure "HL3" (in particular relating to legal expenses incurred in his divorce, paragraph 52.1)

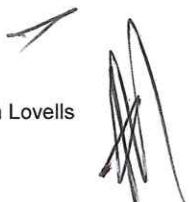
<sup>41</sup> Paragraph 51.1 of annexure "HL3"

<sup>42</sup> Our Report was legally privileged, but SARS agreed to provide it to the Portfolio Committee on Public Finance (the "Portfolio Committee") and on 23 May 2018, Our Report was released to the public with certain personal information redacted. Our Report is likewise redacted and attached as annexure "HL4" and excludes the annexures thereto (including the PwC sources of funds report, which has not been made public)

<sup>43</sup> Paragraphs 7 and 36 of Our Report

<sup>44</sup> Paragraph 9.3 of Our Report

<sup>45</sup> Paragraph 25 of Our Report



its ability to discipline an employee for unexplained sources of income in the absence of evidence that misconduct was committed."<sup>46</sup> We recommended that the Hawks continue with its investigation as it is better placed to determine the sources of funds and whether crimes were committed,<sup>47</sup>

(d) the only payments from SARS to Mr Makwakwa that remained unexplained was in the sum of R162 530.00, because of poor record keeping at SARS and we recommended that the transactions be further investigated by SARS,<sup>48</sup> and

(e) we concluded that in the absence of concrete evidence regarding the 76 cash transactions and the payments by Biz Fire Worx, we could not recommend disciplinary charges against Mr Makwakwa for this.<sup>49</sup> We recommended disciplinary charges for other alleged acts of misconduct.<sup>50</sup>

6.5 Based on our recommendations, SARS charged Mr Makwakwa with the alleged acts of misconduct which we thought could be sustained. A disciplinary hearing ensued before Advocate Terry Motau SC. In that hearing, we instructed counsel to represent SARS in prosecuting the matter and Mr Makwakwa was represented by an attorney and counsel. On 13 October 2017, Advocate Motau SC found Mr Makwakwa not guilty of all the charges.<sup>51</sup>

6.6 We were not instructed to investigate the FIC Report. Our instructions were to advise SARS on its duties and rights *qua* employer and to recommend and prosecute disciplinary charges where appropriate. We also did not "clear" Mr Makwakwa. He was exonerated at the end of his disciplinary hearing presided over by an independent and imminent senior advocate solely in respect of the misconduct charges brought against him.

## 7. CORRUPTION WATCH SUBMISSIONS

7.1 In the Corruption Watch Submissions there are 6 allegations made against Hogan Lovells, which I will respond to below.<sup>52</sup>

7.2 Allegation 1 – Our Report was relied on to reinstate Mr Makwakwa<sup>53</sup>

(a) Our Report<sup>54</sup> was not attached to or referred to in detail in the Corruption Watch Submissions, notwithstanding that it was made public on 23 May 2018 (prior to those submissions being made to the Commission).

(b) The statement is wrong. Our Report recommended disciplinary charges against Mr Makwakwa. Once Advocate Motau SC found him not guilty of those charges, Mr Makwakwa had to be reinstated to his position, unless SARS could demonstrate that he committed tax evasion, or the Hawks could show that he committed crimes, neither of which happened. In that context SARS decided to reinstate Mr Makwakwa

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<sup>46</sup> Paragraph 32 of Our Report

<sup>47</sup> Paragraph 33 of Our Report

<sup>48</sup> Paragraphs 23 and 24 of Our Report

<sup>49</sup> Paragraph 34 of Our Report

<sup>50</sup> Paragraph 37 of Our Report

<sup>51</sup> Advocate Motau SC's finding are attached as annexure "HL5"

<sup>52</sup> The "Role of Hogan Lovells" appears at paragraphs 42-47 and further allegations against Hogan Lovells appear at footnote 41 and in paragraph 6 (by implication)

<sup>53</sup> First sentence of paragraph 43

<sup>54</sup> Annexure "HL4"



7.3 *Allegation 2 – Hogan Lovells would have been aware from prominent and extensive media reports that Commissioner Moyane relied on his referral of the matter to Hogan Lovells to justify a non-referral to criminal authorities*<sup>55</sup>

- (a) It is not clear what is meant by Commissioner Moyane not referring the matter to criminal authorities. The FIC Report was being investigated by the Hawks and Hogan Lovells received confirmation from Colonel Heap that an investigation was already on-going.
- (b) I cannot speak for Commissioner Moyane, but Hogan Lovells' instruction was to advise on who should conduct the various investigations and to assist in the prosecution of employment misconduct where found. Our Mandate Letter and Our Report plainly speak to this.
- (c) I do not know which prominent and extensive media reports are referred to. Hogan Lovells was never asked by Corruption Watch to clarify its mandate or to confirm the nature of the advices or investigations it did, nor was any of Commissioner Moyane's public statements (in parliament or in response to questions) ever tested with us.
- (d) The first time we became aware of a misleading statement by Commissioner Moyane was on 30 October 2017 when Mr Makwakwa was publicly reinstated by Commissioner Moyane. On 3 November 2017, we corrected the public misstatement and issued a press release advising what we were instructed to do.<sup>56</sup>

7.4 *Allegation 3 – Hogan Lovells should have alerted both parliament and the Minister to the fact that they were not carrying out an investigation into the FIC allegations at a much earlier stage*<sup>57</sup>

- (a) Hogan Lovells was not made aware of the interaction between Commissioner Moyane, the Minister of Finance and Parliament as regards the on-going investigations into Mr Makwakwa. As such, we were not aware of what was being said and how that was misleading as alleged.
- (b) Our role was that of professional attorneys advising a client. We were not instructed to investigate the FIC Report, nor could we as private attorneys.
- (c) The treatment and handling of the FIC Report fall squarely within the parameters of section 40(1) of FICA and on that we were advised that the Hawks commenced an investigation. We advised SARS to conduct a tax evasion investigation and for impartiality reasons it outsourced that to PwC. We still do not know the outcome of the tax evasion investigation (but advised SARS that if there was tax evasion whilst Mr Makwakwa was employed, he could have been disciplined for that).

7.5 *Allegation 4 – There is a broader question of law firms and consultants being appointed to conduct internal investigations and later claiming privilege*<sup>58</sup>

- (a) I can think of no reason why SARS could not instruct its long-standing labour attorneys to advise it on how to deal with the FIC Report and any employment

<sup>55</sup> Second sentence of paragraph 43

<sup>56</sup> Our press release of 3 November 2017 is attached as annexure "HL6"

<sup>57</sup> Third sentence of paragraph 43

<sup>58</sup> Paragraph 44

related misconduct arising therefrom, particularly considering the seniority of Mr Makwakwa.

- (b) It is not proper to lump attorneys and consultants together when speaking of legal privilege or confidentiality. Confidentiality arises from the contract between the principal and the service provider, but legal privilege arises in the contemplation of litigation and is a matter of substantive law. Our instructions were clearly in contemplation of litigation. SARS and Mr Makwakwa were represented by attorneys and counsel and Mr Makwakwa referred a dispute to the CCMA<sup>59</sup> claiming an unfair suspension. In fact, Mr Makwakwa was represented by his attorneys from the inception of this matter.
- (c) Hogan Lovells was not at any point in time at liberty to disclose the nature of its instructions or the nature of our advice unless legal privilege was waived by SARS. I appeared before the Portfolio Committee on 5 December 2017 and again on 23 May 2018 and made statements<sup>60</sup> wherein I supported the release of Our Report, provided SARS waived the legal privilege that attached to it. SARS did not waive such legal privilege until 23 May 2018.

7.6 Allegation 5 – Hogan Lovells is conflicted<sup>61</sup>

- (a) Hogan Lovells was never instructed to investigate any crimes, nor could SARS do that (save for tax evasion).<sup>62</sup> The submissions misconstrue our instructions and advices as clearly set out in our Mandate Letter.
- (b) The submission that Hogan Lovells could not take the instructions because we had an existing relationship with Commissioner Moyane and possibly Mr Makwakwa and Ms Elskie<sup>63</sup> is nonsensical. I have previously publicly stated that met Commissioner Moyane for the first time after we were instructed by SARS' Employment Relations Department.<sup>64</sup> I do not and have never had any relationship with either Mr Makwakwa or Ms Elskie.
- (c) Hogan Lovells was instructed by SARS and our duty was to the organisation, not to any one person. We acted for SARS under previous Commissioners and currently act for SARS under the Acting Commissioner. Our duty was to act professionally, which we did. We were not influenced by anyone in the execution of our mandate.<sup>65</sup>

7.7 Allegation 6 – Commissioner Moyane should not have allowed Mr Makwakwa to return to work while criminal charges were pending against him<sup>66</sup>

- (a) It appears that Corruption Watch did not have regard to Our Report before making its submissions. If it had done so, it would have seen what we said about the Hawks' pending investigation and the impact on Mr Makwakwa's employment.

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<sup>59</sup> Commission for Conciliation, Mediation and Arbitration

<sup>60</sup> My statements are attached as annexures "HL7" and "HL8"

<sup>61</sup> Paragraphs 45 and 46

<sup>62</sup> Paragraph 45

<sup>63</sup> Paragraph 46

<sup>64</sup> I attach as annexure "HL9" our public document headed "Sunlight over Shadows" at p9 thereof

<sup>65</sup> Paragraph 47

<sup>66</sup> Second part of paragraph 46

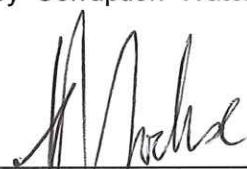
- (b) There were no criminal charges pending while we were instructed. The Hawks had commenced an investigation and to date, as far as I know, no criminal charges have been put to Mr Makwakwa.
- (c) We advised, and I stand by my advice, that if there were criminal charges put to Mr Makwakwa, that would in labour law have laid a basis for disciplinary action, but not before that.

7.8 Whitewash – reference is made to the public statements of British House of Lords Peer Lord Peter Hain that Hogan Lovells issued a whitewash of a report and that we covered up corruption at SARS. In this regard I say:

- (a) a simple reading of Our Report will show that our report is not a whitewash.
- (b) we advised in law where disciplinary action could be taken and where not. We stated that the pending criminal and tax evasion investigations could lead to further disciplinary charges should they reveal misconduct. We did not exonerate Mr Makwakwa;
- (c) no corruption was alleged at SARS, neither in the FIC Report nor in the PwC sources of funds report. At worst R162 530.00 of payments by SARS to Mr Makwakwa could not be verified (but that was because of poor record keeping and we advised SARS to investigate this further). None of the 76 cash transactions or the payments from Biz Fire Worx foreshadowed any corruption at SARS at the hand of Mr Makwakwa;
- (d) Lord Hain referred the matter to the Solicitors' Regulatory Authority in London, the outcome of which was that the matter does not fall within their jurisdiction to consider;
- (e) we have also referred this matter to the Law Society for the Northern Provinces for investigation, notwithstanding that there is no formal complaint with the Law Society against us by anyone; and
- (f) the statement is utterly baseless and highly prejudicial.

## 8. CONCLUSION

- 8.1 We as a firm (and I as a senior attorney) fully support the work of the Commission and will cooperate with your offices in any manner requested of us.
- 8.2 I trust that what I have set out herein assists the Commission in its deliberations as regards the Corruption Watch Submissions insofar as they relate to Hogan Lovells.
- 8.3 I do not comment on any of the other submissions made by Corruption Watch and support any investigation into them.



LAVERY SECHABA MODISE

I HEREBY CERTIFY THAT THE DEONENT HAS ACKNOWLEDGED THAT HE KNOWS AND UNDERSTANDS THE CONTENTS OF THIS AFFIDAVIT, WHICH WAS SIGNED AND SWORN TO BEFORE ME AT Sandton ON THIS THE 15<sup>th</sup> DAY OF October 2018, THE REGULATIONS CONTAINED IN GOVERNMENT NOTICE NO 3619 OF 21 JULY 1972 AND NO 1648 OF 19 AUGUST 1977 HAVING BEEN COMPLIED WITH.

  
\_\_\_\_\_  
COMMISSIONER OF OATHS

Patricia Freda Blaauw  
Commissioner of Oaths  
Reference 107/7/10  
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"HL1"

OUT.

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Your ref Mr T Mokoena  
Our ref L.Modise/J.Ewang/4290336  
Matter ref: L04767

29 September 2016

**Private and Confidential**

Dear Sirs

**INVESTIGATION: SOUTH AFRICAN REVENUE SERVICE**

1. Our letter of 19 September 2016 refers.
2. The South African Revenue Service ("Consultant and/or SARS") has requested that we provide a scope of the investigation which can be undertaken by our Firm.
3. We confirm having been provided with a bundle of documents as set out in annexure A attached hereto.
4. Contained in the bundle of documents is correspondence from the Director of the Financial Intelligence Centre (FIC) to Commissioner Moyane dated 17 May 2016. Under cover of this letter, Commissioner Moyane is provided with a report stating amongst other things, that Mashudu Jonas Makwakwa (Makwakwa) and Kelly Ann Elskie (Elskie), both employees of Consultant, may be involved in or facilitating corrupt activities. The report notes that the FIC received various cash threshold reports and suspicious transaction reports regarding Makwakwa and Elskie.
5. The correspondence indicates that the FIC is providing the report to Consultant in accordance with section 40 of the Financial Intelligence Centre Act, 38 of 2001 (FICA) for investigation to determine:
- 5.1 Whether the funds received by Makwakwa and Elskie constitutes payment of proceeds of crime arising from corrupt activities as defined in the Prevention and Combating of Corrupt Activities Act 12 of 2004 (PRECCA). ("Request A")

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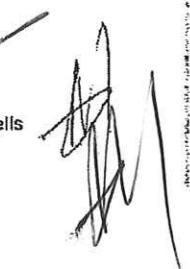
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- 5.2 Whether Makwakwa and Elskie have committed acts of tax evasion and other contraventions of the Tax Administration Act of 2011 (Tax Administration Act). ("Request B")
- 5.3 Whether Makwakwa and Elskie effected payment in contravention of internal policies and/or the Public Finance Management Act 1 of 1999 (PFMA) ("Request C"); and
- 5.4 Whether the aforementioned conduct of concealment and disguising of the true source of these funds constitute acts of money laundering as defined in section 1 of the Prevention of Organised Crime Act, 121 of 1998, (POCA) ("Request D").
6. The FIC report does not come to any definitive conclusions on whether Makwakwa or Elskie have committed an offence(s). Rather, the report provides data of suspicious activity which requires further investigation and analysis prior to a conclusion being reached regarding culpability.
7. We note from the bundle of documents provided to us that on 15 September 2016 Colonel Heap of the DPCI contacted the office of the Commissioner regarding allegations against Mr Makwakwa that appeared in the Sunday Times on 11 September 2016. We are not aware of any other communications or developments following on from such email correspondence.
8. In July 2016, Consultant invited Makwakwa and Elskie to submit written responses to the allegations contained in the FIC Report by 1 August 2016. On 27 July 2016, both employees requested an extension to submit their responses by 30 September 2016. This request was granted.
9. We set out below under each specific request how we believe our Firm is able to assist Consultant to execute its duties as an employer and organ of state.

#### General Context in which Consultant operates

10. Consultant is established as an organ of state within the public administration, but as an institution outside the public service in accordance with the South African Revenue Service Act, 34 of 1997. ( SARS Act)
11. To achieve its objectives Consultant must secure the efficient and effective, and widest possible, enforcement of the national legislation listed in Schedule 1 of the SARS Act. Schedule 1 lists the Tax Administration Act.
12. Section 40 of FICA deals with access to information held by FIC. Section 40 (1) of the FICA states that no person is entitled to information held by the Centre, except-
  - 12.1 an investigating authority inside the Republic, the South African Revenue Service and the intelligence services, which may be provided with such information-
    - (a) on the written authority of an authorised officer if the authorised officer reasonably believes such information is required to investigate suspected unlawful activity; or
    - (b) at the initiative of the Centre, if the Centre reasonably believes such information is required to investigate suspected unlawful activity;



REQUEST A

A. Whether the funds received by Makwakwa and Elskie constitute payment of proceeds of crime arising from corrupt activities as defined in PRECCA.

13. PRECCA aims to provide amongst other things, measures to prevent and combat corruption and corrupt activities; to provide for the offence of corruption and offences relating to corrupt activities; and to provide for investigative measures in respect of corruption and related corrupt activities.

14. The request from the FIC is in essence for Consultant to determine whether an offence in terms of PRECCA has been committed by Makwakwa or Elskie. Offences in terms of PRECCA constitute a criminal offence.

15. The investigation of criminal offences ordinarily falls within the jurisdiction of the South African Police Services (SAPS). In our view criminal aspects of the allegations against these two employees (with the exception of offences in terms of tax legislation which Consultant would ordinarily investigate) should be referred to the SAPS for criminal investigation.

16. It appears from the correspondence of Colonel Heap of the DPCI's Serious Corruption Investigation Component dated 15 September 2016 that an investigation is already underway. Colonel Heap however extended an invitation to Consultant to make contact and work in collaboration with its investigator assigned to the enquiry.

17. The engagement and/or interaction between the DPCI and Consultant fall outside these terms of reference. The Hawks are currently dealing with the criminal investigation pertaining to the two SARS employees. The criminal investigation is being administered by the Hawks' Anti-Corruption Investigation Unit under DPCI enquiry: 03/06/2016. The Hawks and Consultant have already established a solid and harmonious working relationship in respect of the criminal investigation against the two employees. Consequently, the Firm shall be engaged by Consultant as and when required and on a need to know basis.

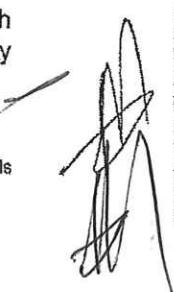
18. According to the FIC report, Elskie made three cash deposits into her personal bank account. The sources of the funds are at this stage unknown and the deposits are deemed suspicious and unusual.

19. Similarly, the investigation of the source of the funds to Elskie would constitute a criminal investigation and this aspect is currently being investigated by the DPCI.

20. PRECCA imposes a reporting duty on any person who holds a position of authority and who knows or ought reasonably to have known or suspected that any other person has committed-

20.1 an offence under Part 1 (*General offence of corruption*), 2 (*Offences in respect of corrupt activities relating to specific persons*), 3 (*Offences in respect of corrupt activities relating to receiving or offering of unauthorised gratification*) or 4 (*Offences in respect of corrupt activities relating to specific matters*), or section 20 (*Accessory to or after offence*) or 21 (*attempt, conspiracy and inducing another person to commit offence*) (in so far as it relates to the aforementioned offences) of Chapter 2 of PRECCA; or

20.2 the offence of theft, fraud, extortion, forgery or uttering a forged document involving an amount of R100 000 or more, must report such knowledge or suspicion or cause such knowledge or suspicion to be reported to the police official in the Directorate for Priority Crime Investigation (DPCI).



21. Failure to report constitutes an offence.
22. On written advice by the Hawks, Consultant has not yet laid a formal complaint with the DPCI as the FIC report does not make any definitive conclusions on whether there has been commission of an offence. It is therefore imperative for Consultant to undertake this investigative process (through its attorneys) in conjunction with the DPCI, the outcome of which will inform the nature of the formal complaint(s) to be laid with the DPCI.
23. 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, then disciplinary action must be taken against them in addition to any criminal offences which may be uncovered by the DPCI. At the appropriate stage, the Firm shall assist with all disciplinary action subject to compliance with Consultant's procurement policies.

**REQUEST B****B. Whether Makwakwa and Elskie committed tax evasion and other contraventions of the Tax Administration Act 28 of 2011**

24. The administration of Tax Acts as defined in the Tax Administration Act includes the obligation to obtain full information in relation to anything that may affect the liability of a person for tax in respect of a previous, current or future tax period; determine the liability of a person for tax; investigate whether a tax offence has been committed, and, if so-
  - (i) to lay criminal charges; and
  - (ii) to provide the assistance that is reasonably required for the investigation and prosecution of the tax offence;
25. As part of its overall function and responsibilities, there exists a duty on Consultant to comply with the first request by the FIC and determine whether the alleged deposits and payments made and received by Makwakwa and Elskie have resulted in contravention of tax legislation or constitute a tax offence. This investigation should be done in the context of Makwakwa and Elskie as taxpayers and not necessarily as employees. In this regard the responses to the allegations to be received from the employees on 30 September 2016 as set out in paragraph 8, must be considered.
26. In the event Consultant determines that a tax offence has been committed by Makwakwa or Elskie then such act or omission would also constitute misconduct in the employment context in respect of which disciplinary action should be taken.
27. Consultant must independently determine whether there has been contravention of tax legislation or commission of a tax offence. Consultant shall appoint the relevant personnel within SARS to conduct the necessary tax audit taking into account the relevant legislative prescripts.
28. 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 the Firm's mandate to assist Consultant to institute disciplinary action against the employee(s) concerned.

**REQUEST C****C. Whether Makwakwa and Elskie effected payments in contravention of internal policies and/or the PFMA**

29. In order to determine if there has been a contravention of internal policies and/or the PFMA, Consultant will first need to establish the basis of the payments made by Makwakwa and Elskie as set out in the FIC report.
30. The payments to Makwakwa as listed in the FIC report can be divided into two categories:
  - 30.1 Payment from entity Biz Fire Worx to Makwakwa (after a long sequence of money transfers between different entities emanating from an initial payment from the Department of Water Affairs and Forestry to New Integrated Credit Solutions); and
  - 30.2 Ad hoc payments from Consultant to Makwakwa.
31. The FIC report notes that the payments made to Makwakwa which originate from Consultant<sup>1</sup> were ad hoc and irregular. Further that these payments should be investigated to determine whether Consultant has been defrauded and effected payments in contravention of internal policies and/or the PFMA.
32. It is essential to establish the source and basis of these ad hoc payments to Makwakwa. We are of the view that this process be undertaken in conjunction with Request B as that process will be able to establish the source of the funds, and whether there has been any contravention of Consultant's policies and/ or the PFMA.
33. Once the investigation into Requests B and C is completed, Consultant will be in a position to determine the appropriate disciplinary action against the employees.
34. The FIC report notes that the payment from Biz Fire Worx to Makwakwa and the prior money transfers between the various entities need to be investigated to determine if they constitute payment of proceeds of crime arising from corrupt activities on the part of Makwakwa and others, money laundering and/or give rise to an obligation for SARS under the PFMA and its accountability to the executive authority. This aspect should be reported to the SAPS for investigation as it falls squarely within its jurisdiction.
35. Once the basis of the payments made to Makwakwa by Consultant is established, our offices will be in a position to determine if there has been a breach of Consultant's internal policies and or the PFMA and recommend the manner in which the findings should be addressed.
36. In the event that the SAPS investigation and that conducted by the relevant internal personnel within SARS reveal that the payment to Makwakwa by Biz Worx constitutes an offence, we will also be in a position to assist Consultant to institute disciplinary action.

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<sup>1</sup> See annexure F of the FIC report – table of ad hoc payment from SARS

**REQUEST D**

D. Whether the aforementioned conduct of concealment and disguising of the true source of these funds constitute acts of money laundering as defined in section 1 of POCA.

37. Money laundering as defined in section 4 of POCA constitutes an offence.

38. The investigation of criminal offences falls within the jurisdiction of the South African Police Service and such aspect of the FIC request should be reported to the SAPS for further investigation. Given that Colonel Heap is to be engaged further to seek the assistance of the DPCI to investigate Request A, we suggest that the engagement should also include Request D.

**Conclusion**

39. With regard to Request B, Consultant is under an obligation to determine whether Makwakwa or Elskie in their capacity as tax payers, have committed a tax offence given the information contained in the FIC report. This investigation must also include a determination of the basis of the ad hoc payments to Makwakwa as required under Request C.

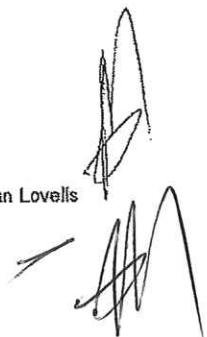
40. In the event that Consultant establishes that Makwakwa or Elsie have committed an offence in contravention of any tax legislation or that there has been a contravention of internal policies and/or the PFMA then we are in a position to assist Consultant to institute disciplinary action against such employee.

41. We estimate that the investigation as per these terms of reference is to be concluded either at the end of October 2016 or the first week of November 2016. Consultant shall extent the time period if the Firm requires such an extension in order to conclude its investigation.

42. Once the investigation has been undertaken and if the outcome reveals that an offence has been committed by either Makwakwa or Elskie, we will be in a position to assist Consultant to initiate disciplinary action for misconduct against either of the employees in the employment context. This would involve drafting disciplinary charges against the employees, prosecuting the disciplinary enquiry, and the appointment of an external chairperson. The firm shall appoint either a retired judge who is knowledgeable in labour law or a Senior Counsel who is knowledgeable in labour law and with more than 15 years experience at the bar.

43. Should Consultant accept the terms as set out above, we request that the acceptance be confirmed by appending a signature below.

44. We advise accordingly.



Tebogo Mokoena

- 7 -

27 September 2016

Yours sincerely



Lavery Modise / Jean Ewang / Phelheni Nkuna  
Chairman / Senior Associate / Associate  
Hogan Lovells (South Africa) Inc.

For South African Revenue Service:

Signature: 

Name: COMMISSIONER TOM MOYANE  
Designation: COMMISSIONER, SOUTH AFRICAN REVENUE SERVICE  
Date: 04 October 2016



“HL2”

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Financial Intelligence suggests that the subjects:

**MASHUDU JONAS MAKWAKWA<sup>1</sup>** (ID 6901066129084) (“MJM”), employed by the South African Revenue Service (“SARS”) as an Executive and Chief Officer: Business and Individual Taxes and **KELLY-ANN ELSKIE<sup>2</sup>** (ID 8805160057083) (“KE”), an employee at SARS, may be involved in or facilitating corrupt activities.

Suspicious and unusual cash deposits and payments into MJM’s and KE’s personal bank accounts require investigation to determine if these cash deposits and payments are proceeds of crime and/or money laundering in order to institute appropriate criminal justice action.

### **SUSPICIOUS AND UNUSUAL CASH DEPOSITS AND PAYMENTS INTO MJM’s<sup>3</sup> ACCOUNT**

MJM’s personal bank account<sup>4</sup> is the primary account used to receive and disburse funds. Credits into this account have increased yearly<sup>5</sup> from R1,358,817.01 in 2010 to R3,418,925.43 in 2015 (approximately 152%). Likewise, MJM’s payments have grown over this period, creating a dependency on suspicious cash deposits and payments to maintain his current standard of living. These payments and cash deposits are of concern as they originate from unknown sources and undetermined legal purpose.

### **SUSPICIOUS AND UNUSUAL CASH DEPOSITS:**

Between 01 March 2010 and 31 January 2016 seventy five (75) cash deposits<sup>6</sup> totalling R785,130.00 were deposited into MJM’s personal bank account; of which forty eight<sup>7</sup> (48) cash deposits amounting to R726,400.00 was deposited between 2014 and 2015.

<sup>1</sup> See Annexure A. ID document of MJM.

<sup>2</sup> See Annexure B. ID document of KE (formerly JORDAAN).

<sup>3</sup> FNB Private Wealth Cheque account 60066187648.

<sup>4</sup> See Annexure C. FNB account 60066187648. Statements for the period 01 January 2010 to 31 January 2016.

<sup>5</sup> 01 March to 28 February of each financial year.

<sup>6</sup> Deposits of coin and paper money of the Republic.

<sup>7</sup> See Annexure C. FNB account 60066187648. Cash deposits marked in yellow.

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A comparative analysis in the value of cash deposits into MJM's personal bank account between 2010 and 2015 revealed that in 2013/2014 a sudden increase from R5,500.00 to R278,400.00 occurred, while in 2015, the value of cash deposits increased to R448,000.00.

Cash deposits constituted R278,400.00 (or 11.4%) of total credits into the account in 2014 and R448,000.00 (or 13.1%) in 2015.

In one cash deposit of R68,000.00, MJM was confirmed as the depositor<sup>8</sup>.

In the forty seven (47) other cash deposits, the identity of the depositor is unconfirmed. However, in thirty four (34) cash deposits (R606,200.00) information suggests that MJM conducted these cash deposits in person.

On 25 September 2014, MJM exchanged foreign currency (US\$ 13,500.00) into South African Rand equal to R147,850.65<sup>9</sup>, which amount was credited to his personal bank account. The source of the foreign currency is unknown.

*The volume and value of cash deposits are highly unusual, as MJM is permanently employed<sup>10</sup>. These afore-mentioned cash deposits should be investigated to determine whether these funds were received by this SARS employee constitute payments of proceeds of crime arising from corrupt activities as defined in the Prevention and Combating of Corrupt Activities Act 12 of 2004 ("PRECCA"), in light of the position of authority held by MJM.*

*The exchange of foreign currency should be investigated to establish if there were exchange control contraventions in this transaction.*

Further, it was also noted that other irregular and ad hoc payments from SARS were credited into MJM's personal bank account. The value of these payments<sup>11</sup> for the past two (2) financial years (2014 to 2015) amounted to R334,459.05 as compared to R82,635.30 between 2012 and 2013.

<sup>8</sup> See Annexure D. Image of depositor.

<sup>9</sup> See Annexure C FNB account 60066187648 (page 72).

<sup>10</sup> See Annexure E. SARS official salary advice.

<sup>11</sup> See Annexure F. Table of ad hoc payments from SARS.

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*These payments should be investigated to determine whether there were any misrepresentations or fraud on the part of MJM that resulted in SARS making these payments.*

**SUSPICIOUS AND UNUSUAL PAYMENTS:**

On 11 February 2015, the DEPARTMENT OF WATER AFFAIRS AND FORESTRY<sup>12</sup> conducted a transfer to the entity NEW INTEGRATED CREDIT SOLUTIONS<sup>13</sup> (Registration 2001/004355/07) to the value of R17,872,957.13<sup>14</sup>.

On the same day, NEW INTEGRATED CREDIT SOLUTIONS transferred R17,872,957.13<sup>15</sup> to another account in the same name via an inter-account transfer.

On 12 February 2015, NEW INTEGRATED CREDIT SOLUTIONS conducted a subsequent inter-account transfer of R5,000,000.00<sup>16</sup> between accounts held in the entity's name.

On 12 February 2015, the entity MAHUBE PAYMENT SOLUTIONS<sup>17</sup> (Registration 2013/066828/07) received R4,468,239.28<sup>18</sup> from NEW INTEGRATED CREDIT SOLUTIONS.

On 13 February 2015, MAHUBE PAYMENT SOLUTIONS made an internal electronic funds transfer ("EFT") payment of R4,200,000.00<sup>19</sup> to a Standard Bank Savings account held in the name of the same entity.

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<sup>12</sup> Funds originated from National Treasury via account number 80332862 held at the South African Reserve Bank.

<sup>13</sup> See Annexure G: CIPC registration certificate.

<sup>14</sup> See Annexure H: ABSA Call account 4053260748 (page 43).

<sup>15</sup> See Annexure I: ABSA Call account 9105455793 (page 05).

<sup>16</sup> See Annexure J: ABSA Cheque account 4058209511 (page 28).

<sup>17</sup> See Annexure K: CIPC registration certificate.

<sup>18</sup> See Annexure L: Standard Bank Bizlaunch account 241349907 (page 77).

<sup>19</sup> See Annexure M: Standard Bank Savings account 226322955 (page 15).

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On 26 February 2015, MAHUBE PAYMENT SOLUTIONS made an internal electronic funds transfer (EFT) payment of R3,800,000.00<sup>20</sup> back to the Standard Bank Bizlaunch account.

Following this, on 26 February 2015, MAHUBE PAYMENT SOLUTIONS made an EFT payment of R3,813,300.00<sup>21</sup> to the entity ARVOMARK<sup>22</sup> (Registration 2012/113693/07).

Again, on 26 February 2015, ARVOMARK made an EFT payment of R3,420,000.00<sup>23</sup> to the entity CLIPPER FINANCIAL SERVICES<sup>24</sup> (Registration 2010/004515/07).

Immediately thereafter<sup>25</sup>, CLIPPER FINANCIAL SERVICES made an EFT payment of R3,125,000.00<sup>26</sup> to MAHUBE PAYMENT SOLUTIONS.

On 04 March 2015, MAHUBE PAYMENT SOLUTIONS made an EFT payment of R1,254,000.00<sup>27</sup> to ARVOMARK.

On the same day<sup>28</sup>, ARVOMARK made an EFT payment of R1,140,000.00<sup>29</sup> to the entity STREET TALK TRADING 181<sup>30</sup> (Registration 2011/075845/23), retaining R114,000.00, approximately 10% of the amount transferred.

Upon receiving this transfer, STREET TALK TRADING 181 immediately<sup>31</sup> transferred R600,000.00<sup>32</sup> to the entity BIZ FIRE WORX<sup>33</sup> (Registration 2012/023231/07).

BIZ FIRE WORX retained R120,000.00 and electronically transferred R480,000.00 in three (3) payments<sup>34</sup>, into MJM's personal bank account as follows:

<sup>20</sup> See Annexure L. Standard Bank Bizlaunch account 241349907 (page 79).

<sup>21</sup> See Annexure N. Standard Bank Business Current account 300120699 (page 57).

<sup>22</sup> See Annexure O. CIPC registration certificate.

<sup>23</sup> See Annexure P. Standard Bank Business Current account 023210346 (page 255).

<sup>24</sup> See Annexure Q. CIPC registration certificate.

<sup>25</sup> 26 February 2015.

<sup>26</sup> See Annexure L. Standard Bank Bizlaunch account 241349907 (page 79).

<sup>27</sup> See Annexure N. Standard Bank Business Current account 300120699 (page 60).

<sup>28</sup> 04 March 2015.

<sup>29</sup> See Annexure R. Standard Bank Bizlaunch account 023071966 (page 55).

<sup>30</sup> See Annexure S. CIPC registration certificate.

<sup>31</sup> 04 March 2015.

<sup>32</sup> See Annexure T. Standard Bank Business Current account 421586427 (page 258).

<sup>33</sup> See Annexure U. CIPC registration certificate. MJM was a director between 08 February 2012 and 03 May 2012.

<sup>34</sup> See Annexure C. FNB account 60066187648 (page 35 and 39). EFTs marked in orange.

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- 09 April 2015 (R150,000.00);
- 09 April 2015 (R200,000.00); and
- 07 May 2015 (R130,000.00).

*These payments must be investigated to determine:*

- *Whether the funds received constituted payments of proceeds of crime arising from corrupt activities on the part of MJM and other individuals and entities involved in these transactions.*
- *Whether the afore-mentioned conduct, concealment and disguising of the true source of these funds constitute acts of money laundering as defined in section 1 of the Prevention of Organised Crime Act 121 of 1998.*

Six (6) days after receiving the last payment from BIZ FIRE WORX (13 May 2015), MJM made an EFT payment of R200,000.00<sup>35</sup> from his personal bank account to Mercedes Benz Financial Services for a Mercedes Benz C220 BLUETEC (Licence DR93JXGP), in favour of a Kelly-Ann ELSKIE ("KE").

#### **SUSPICIOUS AND UNUSUAL CASH DEPOSITS INTO KE's ACCOUNT**

Between 22 and 24 December 2015 three (3) cash deposits totalling R450,200.00 were deposited into KE's personal bank account<sup>36</sup>.

The cash deposits<sup>37</sup> were structured into two (2) payments of R160,000.00 each and one (1) payment of R130,200.00.

The deposits were made over three (3) consecutive days into three (3) different branches of the same bank, all located within an approximate 10 km radius.

KE was confirmed as the depositor<sup>38</sup> for two (2) of the cash deposits.

<sup>35</sup> See Annexure C, FNB account 60066187648 (page 35).

<sup>36</sup> See Annexure V, ABSA Account 4079460540. Statements for the period December 2013 to February 2016.

<sup>37</sup> See Annexure V, ABSA Account 4079460540 (page 57).

<sup>38</sup> See Annexure W, Image of depositor and accompanying persons.

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The source of these funds is unknown and the value of these cash deposits is suspicious and unusual considering the financial profile of KE.

KE used these proceeds along with funds from the sale of a previously owned property to purchase a new property.

*These payments must be investigated to determine:*

- *Whether the funds received constituted payments of proceeds of crime arising from corrupt activities on the part of KE and evaluate the implications to SARS.*
- *Whether the afore-mentioned conduct, concealment and disguising of the true source of these funds constitute acts of money laundering as defined in section 1 of the Prevention of Organised Crime Act 121 of 1998.*

END.



conduct by our client, for which our client must answer to you as his employer.

5.2. Hogan Lovells advised that the regularity or otherwise of the FIC document is an issue for our client to raise with FIC, including to obtain copies of the STRs and CTRs. In your view, as communicated by Mr Lavery, the documents that are said by FIC to give rise to its request to you, in terms of section 40 of FICA, to investigate our client, is not relevant for purposes of your investigation.

6. Our client is in a most invidious position.

6.1. He is accused of criminal conduct based on the content of the FIC document but without FIC having disclosed the important STRs and CTRs that give it cause to invoke section 40 of FICA.

6.2. This request to you by FIC, a materially flawed one in our view, has resulted in our client's suspension and an investigation into possible gross misconduct on his part based on the FIC document.

6.3. In short, you are required to conduct an investigation in consequence of the invocation of a statutory provision but based on an incomplete originating instruction.

7. Even so, our client acknowledges the seriousness of the allegations, as baseless as they are, and the need for you as his employer to investigate their veracity given they are made against a senior executive within the SARS organisation.

8. Our client maintains that there is no substance to the allegations contained in the FIC document and provides by way of this submission, as best he can, a detailed explanation of the deposits and payments recorded in the FIC document.

9. The matters dealt with in this submission relative to the FIC allegations highlight the preposterous nature of the allegations against our client.

10. Please note that our client does not deal with the allegations concerning his fiancé, Ms K-A Elskie, also a SARS employee.

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**Confidentiality**

11. You state in your letter of 20 May 216, to our client, the FIC document is "*classified as extremely confidential containing serious allegations around [our client]*".



- 11.1. It is most disconcerting that these very allegations against our client, despite being extremely confidential, have found their way into the media.
- 11.2. Our client's response, including what is stated in this communication is also extremely confidential and he requests that none of what our client communicates to you be disclosed, in any manner, without our client's prior express written consent.
- 11.3. Our client's concerns about confidentiality were tabled at the meeting with Hogan Lovells as, amongst other things, the communications between our client and you are private and deserving of protection under, at least, the Protection of Personal Information Act, 4 of 2013. It was made clear that our client does not suggest that you would act in any manner contrary to our client's rights of privacy but raised this of necessity given the publication in the media of startlingly accurate reflections of the FIC allegations. .

#### Our client's profile

12. Our client is presently employed by SARS in an executive capacity as the Chief Officer: Business and Individual taxes, reporting directly to the SARS Commissioner.
  - 12.1. Our client joined on SARS 1 August 1995 as an auditor, and over the past 21 years has steadily progressed through the ranks, having served in various senior management positions under three successive SARS Commissioners.
  - 12.2. He was appointed to his current position in October 2015 and prior to that date served as Group Executive: Audit and then as SARS: Chief Operating Officer.
  - 12.3. Our client is one of only a few SARS executive officials issued with a top security clearance, having been subjected to a rigorous background investigation, including a polygraph and financial background/conflict of interest investigation by the State Security Agency.
  - 12.4. Our client has not been charged or investigated previously for any misconduct during his tenure at SARS.

13. Our client is one of SARS' most experienced executive managers and is well versed with the operations of SARS at all levels of the organisation.

13.1. Our client has been tasked to oversee the SARS Restructuring Project as part of the review of its operating model. By all accounts, our client is integral to the restructuring process and serves as an important custodian of the organisation's institutional memory in support of the current SARS Commissioner, Mr Tom Moyane, appointed in 2014.

13.2. Various media reports confirm that the former SARS Commissioner and current Minister of Finance, Mr Pravin Gordhan is vehemently opposed to the SARS Restructuring Project, which resulted in a public stand-off between Mr Gordhan and the SARS Commissioner, Mr Moyane.

13.3. A key part of the SARS Restructuring Project is the review of the SARS IT architecture which serves to support its core business of revenue collection and servicing its customers. The initial IT "health check" has revealed the appointment of certain IT companies in circumstances that justifies investigation. For example, in one instance SARS has spent R 1 billion since 2006 on IT services provided by one service provider, appointed through a tender exemption process.

13.4. As a result of the initial findings of Gartner and Bain Consultants, who were awarded the SARS Restructuring Project, including the initial IT "health check", the SARS Commissioner appointed Grant Thornton PS Advisory in November 2015 to conduct forensic investigations into the procurement of goods and services for the SARS Modernisation and Technology projects from 2007 to 2014. This is referred to as "*Project Lion*".

14. Our client is of the view that the FIC allegations underpinning his suspension on 15 September 2016, appear to be motivated by, amongst other things, concerns that the continued appointment of service providers embedded in SARS for the past 10 years or more may be imperilled if the SARS Restructuring Project proceeds to completion.

15. Our client's status as a senior executive, measured against the FIC allegations about him, we believe brings into question the reason for the FIC document and the request that you investigate our client.

### The FIC document

16. Given his seniority in SARS, our client acknowledges that the FIC allegations about him are very serious; these are described by FIC to be "*suspicious and unusual cash deposits and payments*" into the personal bank accounts of our client and Ms Elskie which SARS is to investigate for contravention of any tax related provisions, internal policies or statutes or benefited from any money laundering or corrupt related activities, and must be investigated.

17. We intentionally do not deal with the legal import and nature of the criminal conduct alleged by FIC.

17.1. It is not necessary to do so in this submission as our client demonstrates he has not acted unlawfully in any manner at all.

17.2. The FIC allegations have been irresponsibly made and the conclusions drawn unsustainable.

17.3. It must be recorded that the allegations against our client have no factual basis and are defamatory of our client.

18. Despite the FIC's request that SARS investigate these very serious allegations in terms of section 40 of FICA and the invitation (see paragraph 2) SARS has not been provided with the CTRs or STRs relied upon by FIC and which gave rise to the request to investigate.

18.1. As stated, in our client's view, section 40 of FICA entitles SARS to these CTRs and STRs, and any other information held by FIC. In light of the allegations made by FIC such information must be reasonably believed to be required for SARS' investigation into what FIC contends is suspected unlawful and criminal activity by our client.

18.2. These suspicions are sufficiently serious for FIC to have referred the FIC document to the Directorate for Priority Crime Investigation.

19. The FIC document represents an analysis of certain transactions (cash deposits and payments) into our client's First National Bank ("FNB") personal bank account covering 71 months between 1 March 2010 and 31 January 2016.

- 19.1. These transactions are recorded on our client's FNB personal bank account statement (annexure C to the FIC document), which was obtained on 22 February 2016, without our client's knowledge or consent.
- 19.2. There is no explanation in the FIC report for why the transactions FIC refers to were not investigated at the time they were each made but rather investigated cumulatively and retrospectively.
- 19.3. Our client surmises that in isolation these transactions are not unusual or suspicious, but taken cumulatively they could be embellished and speculated upon to represent something unusual and suspicious.
- 19.4. Our client denies that the transactions identified by FIC are unusual or suspicious.

20. Our client does not comment on the competence, or otherwise, of FIC submitting the FIC document to SARS for investigation but reserves his rights in this regard.

**The FIC document : suspicious and unusual cash deposits and payments**

21. FIC contends that the payments and cash deposits identified in the FIC document "*are of concern as they originate from unknown sources and with an undetermined legal purpose*". We deal below with origin of the sources, some of which are in fact known to FIC (apparent from the FIC document), and the reasons for the payments and deposits.
22. FIC makes much of the ratio between the payments and deposits, seemingly to create an impression of unlawfulness in our client's banking transactions. There is also much reliance on speculation and innuendo, all of which is ill-conceived and which permeates all of the FIC allegations.
23. Our client does not dispute that the cash deposits and payments reflected in the FIC document were made into his FNB personal bank account.
  - 23.1. These cash deposits and payments are legitimate, have been and will be declared by our client in his annual tax returns, where appropriate, and are explained below.

23.2. These allegedly suspicious and unusual transactions were transparently made by our client and without any intention of concealment, which is in keeping with FICA's principles.

23.3. The transactions that have given rise to the FIC allegations can be categorised as follows:

- 23.3.1. SARS payments (see page 3 of the FIC document and paragraphs 26 and 27 below);
- 23.3.2. repayment of investor funding by Biz Fire Worx (Pty) Limited ("BFW") (see pages 3 to 5 of the FIC document and paragraphs 33 to 42 below);
- 23.3.3. proceeds of the sale of movable property (see page 3 of the FIC document and paragraphs 48 to 49 below);
- 23.3.4. proceeds of the sale of immovable property (see page 2 of the FIC document and paragraphs 44 and 45 below); and
- 23.3.5. family and friend related transactions (see page 2 of the FIC document and paragraph 50 to 54 below).

24. The transactions referred to in the FIC document amounts to approximately R 1 500 000.00 over a 71 month or 6 year period.

- 24.1. Over that same period, our client's income from SARS through salary and performance bonuses amounted to approximately R 15 000 000.00.
- 24.2. Of the approximately R 1 500 000.00, R480 000.00 is repayment on account of investor funding (dealt with below);
- 24.3. This also includes an amount of R 334 459.00 is in respect of legitimate payments client received from SARS in respect of authorised overseas business expense reimbursement and encashment of accumulated annual leave (this is dealt with below).

25. We deal with the specific cash deposits and payments referred to in the FIC document, with reference to the enclosed spreadsheet, marked Annexure A. Our client compiled this spreadsheet which provides detail, amongst other things, as to:

- 25.1. the date of the deposit;



- 25.2. the depositor;
- 25.3. the source of the deposited funds;
- 25.4. the tax status of the funds; and
- 25.5. supporting documentation, enclosed where available.

#### Payments from SARS

26. There is the patent insinuation that our client has defrauded SARS in the 2014 and 2015 financial years with reference to "*irregular and ad hoc payments from SARS*" totalling R334 459.05. Other than to compare to the total paid to our client in 2012 and 2013 of R82 635.30, there is no substantiation by FIC for why such payments are said to be irregular. This suggests that FIC has some insight into the remuneration SARS pays to our client.
27. SARS' strict internal policies and procedures render the allegation that our client has defrauded SARS quite silly, to say the least.
28. There is as a matter of fact nothing irregular at all in the payments from SARS in the 2014 and 2015 financial years totalling R334 459.05.
29. These payments include reimbursement to our client of SARS overseas business travel expenses, duly approved and in accordance with SARS' internal policies.
  - 29.1. Our client travelled to, amongst others, China, Kenya, Spain, Netherlands, Iran, USA, London, Swaziland, Mozambique and Zimbabwe.
  - 29.2. Our client has in support of such reimbursement the documents enclosed marked Annexure "B1" to "B7", but these are not complete.
30. Our client has been able to identify two payments to him that relate to encashment of annual leave in the amount of R99 153 and R23 751.
31. As indicated to Mr Lavery, our client is not in possession of all of the documents supporting these payments to him. The supporting documents were submitted to you at the time that our client claimed reimbursement and the encashment of his leave. Our client advises that

your human resources department will be in possession of the supporting documents and records of these payments.

32. Our client requests that he be provided with all of the records in support of all the payments made to him by SARS, other than in respect of his remuneration, for the period scrutinised by FIC, namely January 2010 to January 2016. He is unable to obtain all of these records as he does not have access to his work emails.

#### Payments from BFW

33. According to the FIC document, our client received 3 payments totalling R480 000 from BFW, as follows:

- 33.1. R 150 000.00 on 9 April 2015;
- 33.2. R 200 000.00 on 9 April 2015;
- 33.3. R 130 000.00 on 7 May 2015.

34. It is alleged that the BFW payments originated from a payment of R17 872 957.13 by the Department of Water Affairs and Forestry ("DWAF") to a company, New Integrated Credit Solutions (Pty) Limited ("NICS") on 11 February 2015.

- 34.1. According to FIC R480 000 of the R17 872 957.13 paid by DWAF found its way to our client, through successive payments of smaller amounts to various third party entities.
- 34.2. It is asserted that a payment of R 600 000.00 to BFW on 4 March 2016, relates to a continuum of transactions tracing back to the original payment by DWAF to NICS a month earlier, was the source of the R480 000 paid to our client.
- 34.3. Our client is aware that NICS did some work for SARS approximately 10 years ago though he was never involved in the procurement of its services.
- 34.4. Our client knows Mr Patrick Monyeki, who is a director of Mahube Payment Solutions (Pty) Limited ("MPS"). Our client does not have any business connection with MPS.

34.5. Our client has no knowledge of the other entities referred to in the FIC document, and in particular is not aware if any of these entities in fact provide services to SARS.

34.6. Our client, as an executive employee of SARS, has no connection whatsoever with DWAF. He is not in any position to influence procurement by DWAF as insinuated by FIC.

35. It is not disputed that client was a director of BFW from its initial CIPC registration in 2012.

35.1. His initial involvement stems from an approach in 2009 by a BFW director, Mr Lokisane Precious Molea ("Molea"), for financial assistance, which gradually evolved into more active strategic support culminating in our client taking a directorship when it was registered in 2012. The company focused on firefighting, cleaning, general maintenance and security related services. The financial assistance was over an extended period of time and including ad hoc purchases of furniture and computer equipment.

35.2. Our client declared his interest in BFW to SARS, as per the enclosed SARS declaration marked Annexure C.

36. Our client was a director of BFW until his resignation at the end of 2012 due to anticipated potential conflict of interest when BFW started competing for public sector tenders and his increased workload as a director of BFW. The CIPC document reflecting the resignation is enclosed marked Annexure D.

37. By the time he resigned as a director our client had provided investor funding to BFW and Molea totalling R 550 000.00 to enable Molea to, amongst other things, set up the business of BFW and to purchase supplies relating to its core business.

37.1. Molea undertook a written acknowledgement of debt ("AOD") in favour of our client in the amount of R550 000, representing the "TOTAL AMOUNT INVESTED IN [BFW]". A copy of the AOD, dated 28 February 2012, is enclosed marked Annexure E.

37.2. It was a material term of the AOD that BFW make regular payments in settlement of the R550 000 loan "AS AND WHEN

FUNDS BECOME AVAILABLE" and notably into our client's FNB personal bank account with account number 6006618764.

38. BFW was not able to repay the loan when our client resigned as director in late 2012. The three payments totalling R 480 000.00 were paid on account of what is owed under the AOD. A balance R70 000 remains outstanding. Payment was made into the specified bank account, which is the very same FNB personal bank account subjected to FIC scrutiny.

39. These payments to our client from BFW will be declared on our client's annual income tax return, which is due at the end of November 2016.

40. Without in any way being obliged to, and only in order to deal with the allegations against our client, he enquired from Molea about the origin of the funds that enabled BFW to make the payments to our client in April and May 2015, some three years after the AOD was signed.

40.1. Molea provided our client with an affidavit, signed and commissioned on 14 September 2016, in which he states, amongst other things, the following:

40.1.1. in order to finance the purchase of certain pumps to be supplied to the Department of Mineral Resources ("DMR"), he obtained a loan from a friend, Philip Arnold of Street Talk trading 181 CC t/a STT Services ("STT") in the amount of R600 000;

40.1.2. the loan of R600 000 was transferred to BFW in early March 2015;

40.1.3. it transpired that the requisition for pumps to be supplied to the DMR was a scam;

40.1.4. Molea used the R600 000 to repay R480 000 on account of the R550 000 "existing loan which was already 4 years outstanding".

40.2. A copy of Molea's affidavit is enclosed marked Annexure F.

41. Our client points out the statement in the FIC document that:

*"Upon receiving this transfer, STREET TALK TRADING immediately transferred R600,000.00 to the entity BIZ FIRE WORX (Registration 2012/023231/07). BIZ FIRE WORX retained R120,000.00 and*

electronically transferred R480,000.00 in three (3) payments, into MJM's personal bank" (our emphasis)

- 41.1. It is not explained in the FIC document how this conclusion of "immediately" is arrived at or why this conclusion, suggestive of something sinister, is in any way relevant to the FIC allegations about our client. This conclusion is obviously inconsistent with and irrelevant to the facts recorded in the FIC document concerning our client and the payments to him by BFW.
- 41.2. It is stated that the transfer of R 600 000.00 to STT was on 4 March 2015 and that the first two payments totalling R 300 000.00 from BFW to our client were on 9 April 2016; FIC's insinuation cannot be imputed to our client given the payments were made to him by BFW a month after it had received money from STT.
42. It is evident that the lack of contemporaneity between the transaction dates and payments set out by FIC, without any supporting bank statements, does not support the inference of a link between DWAF and what BFW paid our client.
43. Aligned with the payment from BFW, and presumably with a view to sustain another insinuation of unlawful conduct, the FIC document records that our client "made an EFT payment of R 200 000.00 ... on 13 May 2015 to Mercedes Benz Financial Services for a Mercedes Benz C220 BLUETEC (Licence [REDACTED] in favour of [our client's fiancé])".
  - 43.1. This information is not discernible from our client's FNB personal bank statements. There is no explanation in the FIC document as to the source of this information.
  - 43.2. It appears that this information was obtained outside the remit of what our client understands to be the ambit of FIC's investigation expressed in the FIC letter.

#### Sale of immovable property

44. Our client acquired certain immovable property, comprising a vacant stand described as no 1382, Makhado Location, Dzanahl, Venda ("property") in August 2012 for R89 000.

44.1. The purchase price was to be paid by way of a deposit of R8 900 on 22 April 2011 and the balance of R80 100 by 30 August 2011.

44.2. Our client had intended to establish a business on the property but over time lost interest in doing so. Motivated by the increase in the value of the property, our client determined to dispose of it.

45. The property was sold in April 2015 to a construction company, Rym Construction Enterprises, for R 250 000.00, payable in instalments by 1 March 2016. These payments were received mostly in cash which client deposited into his FNB personal bank account.

46. A copy of the two offers to purchase are enclosed marked Annexure G and Annexure H, respectively.

#### **Sale of movable property**

47. This relates to the deposit of USD13 500 into our client's FNB personal bank account.

48. Our client's father, Mr Motlisie Patileswana Mokoena, is a Zimbabwean national. Our client did not have any contact with this father during his upbringing. In 1996, our client made contact with his father for the first time. By then he had just started his career at SARS.

48.1. As a traditional gesture of compensation for not contributing to our client's upbringing, his father offered him 25 cattle as recompense. Our client's father runs a thriving business in livestock, selling to abattoirs, butcheries and other buyers of livestock. Our client accepted the gift and the cattle remained in Zimbabwe, in the possession and under the care of Mr Mokoena.

48.2. By 2014, the herd of 25 cattle had grown substantially. At our client's request, 21 of his cattle was sold and realised sale proceeds of USD 14 200, USD 13 500 of which was delivered to our client by a relative.

48.3. The foreign currency of USD 13 500 referred to in the FIC document, equating to R147 850.65, represents the net proceeds of the sale of our client's cattle on his behalf by his

father, Mr Mokoena. The difference of USD 700 was paid to the individuals who took care of the sold cattle.

49. We enclose an affidavit by Mr Mokoena in which he deals with sale of the cattle as well as the financial assistance he provides to our client from time to time, marked Annexure I.

#### Family and friend related transactions

50. It is apparent from the information provided in the spreadsheet (Annexure A) that a substantial number of the transactions are family and friend related.

51. Many of the transactions refer to our client's father, Mr Mokoena. We refer to what is stated in paragraphs 47 to 49 above in regard to Mr Mokoena.

51.1. In addition to attending to the sale of our client's cattle, our client's father provides financial assistance to our client as well as funds from time to time for disbursement to or on behalf of our client's siblings, his mother and other family members.

51.2. In other instances our client, as the eldest son collects funds from various family members for family projects and events, and uses his personal FNB bank account for such collections and related disbursements.

52. In order to illustrate the nature of these related transactions, we point out certain items on Annexure A.

52.1. Our client made a deposit on 18 January 2016 of R 48 700.00. Mr Mokoena provided the R 48 700.00 to assist our client with his residential rental obligation and with the legal expenses our client had incurred in connection with his divorce from Molibinyane Makwakwa, who is also a SARS employee. The divorce was finalised on 13 October 2016.

52.2. A deposit of R 50 000.00 was made by client on 20 November 2014, which was a reimbursement by Mr Mokoena for motor vehicle tyres, groceries and clothing our client had purchased for his father.

52.3. There are a number of deposits by our client in respect of repayments of loans that he had extended to friends and

family, such as his cousin Joë Makwakwa and his friend Stephen Mulandzi.

52.4. As the eldest son our client coordinates family functions and takes care of family responsibilities. He has made deposits of contributions paid by family members for example for their 2014 year end function. There were also contributions to the cost carried by our client for repairs to his grandmother's home.

53. It is inconceivable that deposits of this nature could be suspicious or unusual. They are not.

#### In conclusion

54. Our client believes that he has provided an explanation for the deposits and payments labelled by FIC as unusual and suspicious, with sufficient detail to demonstrate that our client has not engaged in any corruption or money laundering or any other unlawful conduct.

54.1. Our client has been transparent, as far as FICA is concerned, by utilising his FNB personal bank account for all these transactions.

54.2. There is no evidence or justifiable suspicion of any alleged unexplained wealth conducted through undercover transactions.

54.3. There is no evidence of any concealment of funds by our client and despite such obvious transparency in line with FICA our client is accused of criminal conduct.

#### Abuse of Process

55. For the sake of completeness and necessity, our client returns to the statement by FIC that the payments and cash deposits "are of concern as they originate from unknown sources and with an undetermined legal purpose", our client has serious reservations about the propriety of the FIC process in this instance and suspects that it has been improperly influenced and is thus tainted.

56. Our client's reservations are informed by:

56.1. the cumulative and retrospective reliance on STRs and CTRs covering a period of 71 months or 6 years;

56.2. the failure to provide SARS with such STRs and CTRs;

56.3. linking our client and his fiancé in unlawful conduct when the transactions relating to each of them are unrelated to one another and they keep separate personal bank accounts;

56.4. information about our client having paid R200 000 to Mercedes Benz Financial Services towards the purchase of a clearly identified motor vehicle and stated to be in favour of our client's fiancé;

56.5. the video footage of our client at his bank;

56.6. the unlawful disclosure of the FIC document and detailed reference to its content in the media suggesting an abuse of process designed to feed a mischievous agenda;

56.7. the detailed knowledge by an opposition party member of the FIC investigation in respect of our client, expressed by that member in early September 2016, when SARS appeared before Parliament's Standing Committee on Finance.

57. The observations set out in paragraph 56, are strongly suggestive of an investigation beyond the remit of a FIC financial analysis of someone alleged to be defendant *"on suspicious deposits and payments to maintain his current standard of living"* and who *"may be involved in or facilitating corrupt activities"*.

58. Our client must express his dismay and dissatisfaction that State resources are being utilised to investigate, and in turn create further State expenditure, in circumstances and for reasons that are not only unjustified, but extremely questionable.

59. Our client can only conclude that there are hidden political forces driving the allegations which has caused his suspension and in the hope of causing our client insurmountable public embarrassment.

#### The suspension

60. Our client did not resist his suspension on 15 September 2016, even though this was almost 4 months after the delivery of the FIC document and in the absence of the STRs and CTRs.

60.1. Our client respects the SARS Commissioner's need to investigate the allegations against him but maintains, as our client consistently has, that there is no merit at all in what FIC has alleged.

60.2. Our client is concerned that the FIC document represents a conflation of labour, tax and criminal issues which may very well lead to real prejudice to him, regardless of our client's constitutional right to fair labour processes, the right to be heard and to be presumed innocent.

60.3. The SARS Commissioner is requested to be particularly mindful of this seemingly deliberate conflation when dealing with this matter.

61. In light of the explanation provided by our client in this submission, he requests that his suspension be uplifted as soon as possible, if not immediately.

62. In our view, our client's detailed explanation supports the immediate lifting of his suspension.

62.1. There is no substance to the FIC allegations.

62.2. There is no suggestion that our client will tamper with evidence and/or interfere with the investigation and / or witnesses.

62.3. There is no suggestion of any risk and / or potential damage to SARS property and / or danger to the well being of other SARS employees.

**Additional matter**

63. During the meeting referred to above with Hogan Lovells, our client was notified that the mandate of Hogan Lovells had been extended to include an investigation into allegations that appeared in The New Age publication on Sunday, 23 October 2016.

63.1. The article refers to Tribert Ayabatwa ("Ayabatwa") losing close to R60m in a scam allegedly involving SARS officials and states that our client is being investigated for his alleged role in the scam because he signed the agreement on behalf of SARS.

63.2. The article suggests that our client was unable to explain why Ayabatwa was instructed to pay money into a private account.

64. We understood from Mr Lavery that we would be formally provided with the article and what was required of our client in regard to these allegations.

65. In anticipation of such a formal notification our client advised Hogan Lovells of the following:

- 65.1. The issue concerned in this article was dealt with by the National Prosecuting Authority ("NPA").
- 65.2. Ayabatwa had left South Africa in order to escape criminal prosecution but was placed under house arrest after being located in England, with the assistance of Interpol.
- 65.3. The NPA initiated a settlement proposal to SARS and subsequently our client signed the settlement agreement, on behalf of SARS, that it concluded with Ayabatwa.
- 65.4. Our client signed the settlement agreement as an authorised SARS representative with the full knowledge and approval of SARS, following extensive discussions between representatives of SARS and NPA.
- 65.5. Our client was not directly involved in the criminal prosecution. We suggest the internal legal representatives for SARS and the NPA be contacted for information in connection with this issue.
- 65.6. Our client's response to the journalist, when asked why payments were made into a private account, was merely to refer the journalist to SARS for comment in accordance with its internal policies on communications with the media, and not for any other reason. Our client is not authorised to engage with the media on SARS matters.

66. As mentioned to Mr Lavery, it is disconcerting that our client is now also to be formally investigated in respect of allegations made in the media, together with the FIC allegations.

- 66.1. There is no substance to the allegations about the Ayabatwa settlement agreement. The details of what transpired in respect of the Ayabatwa settlement agreement were extensively documented and are in SARS' possession.

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66.2. It is inequitable and exceptionally prejudicial to our client to be the subject of a formal investigation simply because of a media article and without first being given an opportunity to provide the background and context to the article and most importantly to refer SARS to the appropriate representatives who were responsible for this Ayabatwa matter.

67. In the circumstances, our client requests urgent written confirmation that he is not being investigated despite the unfounded allegations in The New Age article.

In closing

68. In the event that any further information or clarification is required of our client, please advise us as soon as possible.

69. Our client is anxious to return to work and to restore his good name.

70. We wait to hear from you.

Yours faithfully

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" HL4"

Hogan  
Lovells

THE SOUTH AFRICAN REVENUE SERVICES  
FINAL REPORT  
INVESTIGATION INTO ALLEGATIONS CONTAINED IN THE  
FIC REPORT:  
MJ MAKWAKWA AND KA ELSKIE

Final Report

JNBLIB01/EWANGJEA/4381311.1

Hogan Lovells



# Hogan Lovells

## 1. DEFINITIONS

1.1 The following abbreviations and acronyms are used throughout the report:

- (a) "Commissioner" means the Commissioner of the South African Revenue Services, Mr Thomas Moyane.
- (b) "DPCI" means the Directorate for Priority Crime Investigation
- (c) "FIC" means Financial Intelligence Centre
- (d) "FICA" means the Financial Intelligence Centre Act 38 of 2001
- (e) "LRA" means the Labour Relations Act 66 of 1995 as amended
- (f) "PFMA" means the Public Finance Management Act 1 of 1999
- (g) "PRECCA" means Prevention and Combating of Corrupt Activities Act 12 of 2004
- (h) "POCA" means the Prevention of Organised Crime Act, 121 of 1998
- (i) "PWC" means Price Waterhouse Cooper
- (j) "SAPS" means the South African Revenue Services
- (k) "SARS" means the South African Revenue Services
- (l) "the Employees" – collective reference to Mr M J Makwakwa and Ms K A Elskie

2. After the use of a person's full name they will thereafter be referred to by their surname.

## 3. ANNEXURES

3.1 The following annexures are attached:

- (a) Annexure A – PWC report (minus it's annexures)
- (b) Annexure B – Letter from Baker & McKenzie dated 4 November 2016. ('first response')
- (c) Annexure C – Letter from Hogan Lovells to Baker & McKenzie dated 18 November 2016.
- (d) Annexure D – Letter from Baker & McKenzie dated 29 November 2016 ('second response')



- (e) Annexure E – Permission for Outside work
- (f) Annexure F- Search Results of business interests and properties of Makwakwa
- (g) Annexure G - Questions posed to Elskie and responses thereto.
- (h) Annexure H – PWC addendum to report ( with annexures) dated 17 March 2017
- (i) Annexure I – PWC second addendum ( with annexures) dated 29 March 2017

#### 4. INTRODUCTION

4.1 The Director of the FIC addressed correspondence to Commissioner Thomas Moyane dated 17 May 2016. Under cover of this letter, Commissioner Moyane was provided with a report stating amongst other things, that Mashudu Jonas Makwakwa and Kelly Ann Elskie, both employees of SARS, may be involved in or facilitating corrupt activities. The report notes that the FIC received various cash threshold reports and suspicious transaction reports regarding Makwakwa and Elskie.

5. The correspondence indicates that the FIC provided the report to SARS in accordance with section 40 of FICA for investigation to determine:

- 5.1 Whether the funds received by Makwakwa and Elskie constitute payment of proceeds of crime arising from corrupt activities as defined in PRECCA. ("Request A")
- 5.2 Whether Makwakwa and Elskie have committed acts of tax evasion and other contraventions of the Tax Administration Act of 2011 (Tax Administration Act). ("Request B")
- 5.3 Whether Makwakwa and Elskie effected payment in contravention of internal policies and/or the PFMA ("Request C"); and
- 5.4 Whether the aforementioned conduct of concealment and disguising of the true source of these funds constitute acts of money laundering as defined in section 1 of POCA ("Request D")

6. The FIC report does not come to any definitive conclusions on whether Makwakwa or Elskie have committed an offence(s). Rather, the report provides data of suspicious activity which requires further investigation and analysis prior to arriving at a conclusion regarding culpability.

7. At the outset it must be stated that, in line with our terms of reference, the determination of Request B falls within the sole purview of SARS and will not be dealt with in this report. Similarly Request A and D are within the exclusive jurisdiction of the SAPS. We are instructed that the DPCI are already in the process of investigating the FIC allegations.

8. Our terms of reference are contained in the terms of reference signed by Commissioner Moyane on 4 October 2016.

9. As part of our mandate, SARS instructed us to brief PWC. PWC's mandate is to determine:

9.1 Whether Makwakwa and Elskie effected payments in contravention of internal SARS policies and/or the Public Finance Management Act 1 of 1999 (PFMA)

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- 9.2 Determine whether the payments made to Makwakwa by SARS other than his salary, which the FIC described as 'ad hoc and irregular' have resulted in SARS being defrauded and/or effected payments in contravention of internal policies and/or the PFMA.
- 9.3 PWC's mandate also includes investigation of Request B - Whether Makwakwa and Elskie have committed acts of tax evasion and other contraventions of the Tax Administration Act. This will require determination of whether the alleged deposits and payments made and received by Makwakwa and Elskie, as detailed in the FIC report, have resulted in contravention of tax legislation or constitute a tax offence. For this reason alone, the determination of Request B will not be dealt with in this report.
10. PWC has in this regard produced a report on its findings. The report (excluding the annexures) is attached hereto marked annexure "A". After receipt of additional information from SARS on 16 March 2017, PWC issued an addendum to its report on 17 March 2017. This addendum and its annexures are attached hereto marked annexure "H". This report will make recommendations to SARS arising from PWC's findings. A copy of the report and the annexures will be provided separately.

## 11. PROCESS AND METHODOLOGY FOR THE INVESTIGATION

The methodology followed was divided into distinct phases with the following components:

### 11.1 INVESTIGATION PLANNING

This stage involved a meeting with the investigators and Mr Teboho Mokeona and Mr Ngwako Rapholo at which meeting we were briefed about the FIC report and events that transpired since receipt of the FIC report.

Our investigation does not involve commenting on the competency or otherwise of the FIC submitting the FIC report to SARS for investigation.

### 11.2 CONSULTATION AND INTERVIEW PHASE

After review of the FIC report and in line with our terms of reference Makwakwa and Elskie were approached for an interview. After engagement with the respective legal representatives of Makwakwa and Elskie, it was agreed that the investigators would receive written submissions from Makwakwa and Elskie in response to the relevant aspects of the FIC report that fall within the investigators mandate.

### 11.3 DOCUMENTATION COLLECTION AND COLLATION

Based on the exchange of the questions and responses certain documentation was provided and requested from the employees as well as from SARS. This documentation was collected and categorised.

### 11.4 ANALYSIS OF SUBMISSIONS AND DOCUMENTS

This involved a careful analysis of the written submissions made by the Employees in conjunction with the PWC report.

11.5 DRAFTING OF THE INVESTIGATION REPORT AND PRESENTATION OF THE REPORT

This involved the drafting of this report.

**ALLEGATIONS AND SUMMARY OF EMPLOYEE SUBMISSIONS**

12. **MJ MAKWAKWA**

12.1 Makwakwa is employed by SARS in the executive capacity as the Chief Officer: Business and Individual Taxes. In this position he reports directly to the Commissioner. This is a position Makwakwa has held since October 2015. Makwakwa has occupied various positions within SARS since becoming employed by SARS on 1 August 1995.

12.2 The FIC report notes that suspicious and unusual cash deposits and payments into Makwakwa's FNB bank account require investigation.

12.3 The cash deposits and payments are divided into two categories:

(a) Suspicious and unusual cash deposits in that between 1 March 2010 and 31 January 2016, seventy-five (75) cash deposits totalling R785 130.00 were deposited into Makwakwa's personal bank account; of which forty-eight (48) cash deposits amounting to R726 400.00 were made between 2014 and 2015. Included in these deposits is an exchange by Makwakwa on 25 September 2014 of foreign currency amounting to 13 500 US dollars and converted into South African Rands in the sum of R147 850.65. The FIC report records that the volume and value of the cash deposits are highly unusual, as Makwakwa is permanently employed.

(b) Suspicious and unusual payments in that Makwakwa received three separate payments from an entity called Biz Fire Worx (Pty) Ltd as follows:

(i) R150 000.00 on 9 April 2015

(ii) R200 000.00 on 9 April 2015

(iii) R130 000.00 on 7 May 2015

12.4 On 25 October 2016 a meeting was held between the investigators, Makwakwa and his legal representative, Ms Sonia De Vries of Baker & McKenzie. At the said meeting questions were posed to Makwakwa relating to the FIC report.

12.5 At the request of Makwakwa's attorney the meeting was not audio recorded.

12.6 It was agreed that a comprehensive response to the questions posed would be submitted to the investigators by Makwakwa on 4 November 2016.

12.7 On 4 November 2016 Makwakwa through his legal representative submitted a response to the FIC report allegations. The response is attached hereto as annexure "B".

12.8 Makwakwa's response is quite extensive and goes beyond mere response to the allegations levelled against him. The response also delves into, *inter alia*, Makwakwa's profile within SARS, allegations that the FIC report appears to be motivated by, amongst other things, concerns that the continued appointment of service providers embedded in

SARS for the past 10 years or more may be imperilled if the SARS Restructuring Project proceeds to completion. The possible motivation for the creation of the FIC report is not within our terms of reference.

12.9 Makwakwa's response to the two broad categories were in summation as follows:

- (a) He admits that the cash deposits and payments reflected in the FIC report were made into his FNB personal bank account.
- (b) These cash deposits and payments are legitimate. These deposits and payments have and will be declared in his annual tax returns where appropriate.
- (c) The deposits and payments can be explained with the following five categories:
  - (i) Payments from SARS;
  - (ii) Repayment of investor funding by Biz Fire Worx;
  - (iii) Proceeds of the sale of immovable property;
  - (iv) Proceeds of the sale of movable property; and
  - (v) Family and friend related transactions- divided into money received from his father, Mr Motlisie Mokoena (M. Mokoena) and other relatives.

#### **PWC FINDINGS REGARDING THE CASH DEPOSITS AND OUR COMMENTS THERETO**

- 13. As part of its mandate, PWC was tasked to investigate each of the seventy-five cash deposits which formed part of the deposits deemed 'unusual or suspicious' by the FIC in order to try identify the nature and source of such payments. The purpose of which will be to ultimately determine whether there has been a contravention of SARS's internal policies or misconduct on the part of Makwakwa.
- 14. PWC's complete findings in this regard are contained in its report. PWC dealt with 76 transactions because in his response, Makwakwa dealt with one additional transaction. The following is noteworthy:
  - 14.1 Monies received from Makwakwa's father<sup>1</sup> (14 of the 76 cash deposit transactions):
    - (a) Makwakwa stated in his response dated 4 November 2016 that he received financial assistance from his father, Mr M Mokoena. Furthermore, that this assistance also extended to being provided with funds to assist with various family related expenses. Mr Mokoena in an affidavit indicates that he is a farmer and businessman residing in Zimbabwe who owns in excess of 200 cattle. Makwakwa alleges that in 1996 his father gifted him with 25 cattle. 21 of these cattle were sold in 2014 for an amount of USD 14 200. Out of this amount, USD 13 500 was brought in cash from Zimbabwe to South Africa by one of Makwakwa's relatives. The balance of USD 700 having been distributed to individuals tasked with the care of the cattle.

<sup>1</sup> See table 3 of the PWC- page 17

- (b) The total value of deposits relating to Mr Mokoena as the source of funds (as per Makwakwa's response) amounts to R330 900.00
- (c) PWC's findings in this regard are that based on the supporting documentation on hand, responses received from Makwakwa and analyses of the transactions, PWC is not able to confirm the source and nature of the funds purportedly received in cash from M Mokoena.
- (d) Further information and documents were requested by Hogan Lovells on 18 November 2016 from Makwakwa in relation to certain of the cash deposits in which he credits his father as the source. Makwakwa's response thereto was that such request was not within the scope of Hogan Lovell's investigation. See annexure "C" and "D"<sup>2</sup>. Our views in relation to this response are dealt with under recommendations.
- (e) Makwakwa indicated that he is no longer in possession of the passport he utilised to travel to Zimbabwe. Makwakwa's leave records for 1996 were requested from SARS to try and determine whether there was a period of absence from work which could be attributed to a visit to Zimbabwe. We were advised that SARS cannot provide the leave records for 1996 as it was utilising the Persal system at that point in time and it no longer has access to this system. We received confirmation that these records are indeed completely inaccessible. We are therefore not able to determine with certainty whether or not Makwakwa did indeed travel to Zimbabwe as alleged.

14.2 Monies received from other family members<sup>3</sup> (15 of the 76 transactions):

- (a) In Makwakwa's response of 4 November 2016, he stated that he received monies from various family members other than his father. The total value of which amounts to R36 700.00.
- (b) PWC's complete findings on these 15 transactions are contained on pages 21-22 of its report. In summary PWC only deems 5 transactions amounting to R1100.00 as having been sufficiently explained by Makwakwa and therefore deemed as plausible. Accordingly, further information in relation to the remaining transactions is required to explain the other 10 transactions. Ultimately PWC's findings on the remaining transactions are that based on the supporting documentation at hand, responses received from Makwakwa and analyses of the transactions, PWC is not able to confirm the source and nature of the cash deposits into Makwakwa's bank account.

14.3 Loans or loan repayments<sup>4</sup> (14 of the 76 transactions):

- (a) These transactions according to Makwakwa relate to loans he received from a cousin or to loan repayments received from various individuals. The total value of the loans and loan repayments amounts to R107 630.00. Included in the loan repayments is an amount of R10 000.00 alleged to be a repayment from Makwakwa's former PA.

<sup>2</sup> Paragraph 38 and 41 of the second response read with paragraph 9.3 and 9.5 and 10 of Hogan Lovells letter dated 18 November 2016.

<sup>3</sup> See table 4 of the PWC report- page 20

<sup>4</sup> Table 5- page 23 of the PWC report

(b) PWC notes that further clarification is required in respect of each of the transactions due to the absence of further documentation or information. Accordingly PWC's has found that based on information on hand, responses from Makwakwa and analyses of the 14 transactions, it is not able to confirm the source and nature of the cash deposits into Makwakwa's bank account.

14.4 Sale of property<sup>5</sup>

(a) Makwakwa indicated in his initial response dated 18 November 2016 that he purchased a vacant stand in April 2011 for R89 000.00. The property was subsequently sold in April 2015 for R250 000.00.

(b) The deed of sale for the purchase of the property indicates it was purchased for R89 000.00. A document entitled "confirmation of outstanding debt" indicates that Makwakwa made full payment of the amount of R89 000.00 on 1 August 2011.

(c) From the bank account statements, an amount of R80 000.00 can be traced as having being paid in respect of the property. The amount of R 9000.00 cannot be traced.

(d) The deed of sale document for the sale of the property by Makwakwa reflects a purchase price of R250 000.00 which is payable in instalments with the final outstanding amount payable on 1 March 2017.

(e) PWC requires further clarification in relation to the purchase and sale of the property in order to reconcile payments from the buyer and the cash funds deposited into Makwakwa's account.

(f) Due to the information on hand or lack thereof, PWC was not able to confirm the source and nature of the cash deposits into Makwakwa's accounts in this category.

14.5 Other sources<sup>6</sup> ( 5 of the 76 transactions)

(a) These five transactions amounting to R44 200.00 are according to Makwakwa related to:

(i) A birthday gift from a friend of R1 000.00. PWC finds that this explanation is plausible.

(ii) Withdrawal from his Nedbank credit card totalling R4 500.00. PWC requires further information relating to the Nedbank account in order to comment thereto.

(iii) Payment from Todani for accommodation for a club outing totalling R26 400.00. PWC requires further information in order to comment thereon.

(iv) Two transactions for a refund for hotel accommodation from "Kgabo" for Rotterdam trip totalling R12 300.00. PWC's findings in this regard are that it is possible that these amounts relate to business travel undertaken to the Netherlands during 24 – 29 October 2015. It is however unclear why Makwakwa was paid by an individual and not SARS if this is the case.

<sup>5</sup> Table 6

<sup>6</sup> Table 8 of PWC report – page 27

None of the SARS related travel documents obtained provide further details in this regard. Further information is therefore required.

14.6 Transactions with no explanation provided by Makwakwa<sup>7</sup> (6 out of the 76 transactions):

- (a) Makwakwa did not provide an explanation as to the source of these funds save to state in respect of one transaction that he could not recall the depositor of the funds totalling R4 000.00.
- (b) PWC was not able to confirm the source and nature of the cash deposits based on the documents and information at hand and in the absence of responses from Makwakwa.

14.7 Payments received from SARS

- (a) The FIC report also noted payments received by Makwakwa from SARS.
- (b) The total amount attributed as payment to SARS is R9 408 998.55. Of this amount, R9 075 920.07 was found to be Makwakwa's monthly salary for the period March 2010 to February 2016.
- (c) A total of R141 801.77 was also found to relate to reimbursements for international travel.
- (d) It is noted that a total amount of R191 276.71 of payments from SARS to Makwakwa could not be reconciled. Additional documentation was requested from SARS in order to eliminate the possibility of these non - reconcilable payments relating to local travel bonuses, and monetary value of leave encashment. In the second PWC addendum, arising from additional documentation provided by SARS, PWC was able to reconcile a further amount of R 28,746.71. This means that the total amount of unallocated SARS payments subsequent to the additional information provided by SARS is therefore R162, 530.00 (R191, 276.71 – R28, 746.71). PWC was not able to determine the basis of the payments from SARS to Makwakwa in the sum of R162 530.00. We recommend that SARS scrutinise each of the unaccounted for transactions (see page 2-6 of the second PWC addendum) and request an explanation (along with supporting documents) from the finance department for each of these transactions.

14.8 Re-payments owed to SARS

- (a) As part of reconciling the payments made from SARS to Makwakwa, PWC noted that an amount of R22 632.64 appeared to be owed by Makwakwa to SARS as a result of international travel.
- (b) This amount consists of
  - (i) R5 222.44 relating to a London trip (18 - 22 April 2015);
  - (ii) R12 095.02 relating to a Iran trip (18-21 September 2015); and

(iii) R5 315.18 relating to a USA trip (9 - 22 November 2015)

(c) On 16 March 2017, SARS confirmed that Makwakwa had in fact made re-payment of these aforementioned amounts.

14.9 General remarks regarding payments

(a) 19 of the deposits wherein the depositor is identified as Makwakwa took place during working hours. It is arguable that in an employer employee relationship Makwakwa is required to obtain permission from his direct supervisor to absent himself from work for the purposes of attending at the bank. However in our view, given Makwakwa's seniority he cannot be required to ask for permission to go to the bank whenever he wants to. However, in the event that it is ultimately found that the source and nature of some of the cash deposits are not legitimate we would recommend that consideration also be given to discipline Makwakwa for using SARS's working hours to attend to make these deposits.

(b) PWC noted that in table 12 (page 30) of its report, the deposits that were made on the same day of what appears to be the same banking location in most cases were by Makwakwa himself. This amounted to 29 of the 76 transactions. It is suspicious that Makwakwa made separate cash deposits on the same day at what appears to be the same banking location instead of depositing the cash into his account in one single transaction.

#### **PWC'S FINDINGS REGARDING PAYMENTS FROM BIZ FIRE WORX**

15. The FIC report notes, in relation to the payments received by Makwakwa from Biz Fire Worx, a flow of funds originating from the department of Water Affairs and Forestry through various entities and ultimately culminating in the three payments totalling R480 000.00 being paid to Makwakwa by Biz Fire Worx. Arising out of these payments, Makwakwa made payment of R200 000.00 to Mercedes Benz in favour of Elskie. It was not disputed by Makwakwa and Elskie that they are in an intimate partnership. Makwakwa's attorneys referred to Elskie as Makwakwa's fiancé. This payment to Mercedes will be dealt with under the section dealing with Elskie.

16. Makwakwa's explanation for the monies paid to him from Biz Fire Worx is summarised as follows:

16.1 He was a director of Biz Fire Worx until his resignation at the end of 2012. He provided the director of the company, Mr Lokisane Molea, with financial assistance and strategic support from approximately 2009. He also assisted with ad hoc funding, advice and planning, as well as supervision of staff.

16.2 He did all this with the aim of financially benefiting when the company became profitable. By the time he resigned as a director of the company, Makwakwa had provided to Biz Fire Worx as a loan a total amount of R550 000.00.

16.3 Makwakwa provided the investigators with an acknowledgement of debt in his favour from Biz Fire Worx. This document is dated 28 February 2012 and reflects an amount of R550 000.00. Makwakwa also provided a spreadsheet of invoices he paid on Biz Fire Worx's behalf from 2011 until 2012 totalling R339 995.75.

16.4 The payments he received from Biz Fire Worx were re-payments of the loan. In support of his response, Makwakwa provided an affidavit from Molea. Molea indicates that he made the re-payments to Makwakwa utilising monies he was given by Mr Phillip Arnold of Street Talk Trading 181 CC. The FIC public information searches however list Arnold as a director of Arvomark (Pty) Ltd and Clipper Financial Services (Pty) Ltd and not Street Talk Trading. Tellingly, all these three entities were part of the entities through which the flow of monies originating from the department of Water Affairs and Forestry passed through. It is therefore noteworthy that Molea links Arnold to Street talk Trading. This point however falls outside the scope of our mandate.

16.5 In the circumstances, PWC was unable to confirm payment of the invoices and unable to reconcile and explain the difference between the R550 000.00 loan allegedly paid to Biz Fire Worx and the R330 995.75 repayment made by Biz Fire Worx to Makwakwa.

17. Issues arising from Biz Fire Worx payments:

17.1 Disclosure of interests and undertaking remunerative work without permission

- (a) All SARS employees are required to declare any financial interests. This is in accordance with the SARS Internal Ethics Policy- Conflict of interest.
- (b) Declarations must occur in April and May and as and when changes occur. The declarations provided by Makwakwa as part of his first response, do not indicate any declaration by Makwakwa of his appointment as director of Biz Fire Worx on 8 February 2012. His declaration of 7 December 2012 does indicate his resignation as a director. In light of the above, we requested copies of Makwakwa's declaration of interests for the period 2011-2012 from SARS.
- (c) SARS confirmed that it was not in possession of any other declaration of interest for the period 2011 to 2012 aside from the one provided by Makwakwa in his first response. However SARS indicated that the only other information in their possession relates to a personal interview conducted with Makwakwa during his vetting in 2014 whereby further information was provided as follows by Makwakwa:
- (d) JLCTM Dynamic Investments CC. This company is an investment / savings company where Makwakwa and four other members save money for their annual vacations.
- (e) Ottos Corner is a plot of land in Limpopo that has not been utilized as yet.
- (f) Kwakwa Investments (Pty) Ltd is a company for investment purposes co-founded with his wife.
- (g) We therefore requested copies of Makwakwa's declarations of interest from 2008 – 2016. These were duly provided. None of these declarations of interest listed Makwakwa's appointment as a director of Biz Fire Worxs. *Prima facie*, and based on the declarations provided by Makwakwa, it appears that he failed to declare his financial interest in Biz Fire Worx to SARS in contravention of the Internal Ethics Policy when he became a director in February 2012.
- (h) Similarly the SARS Code of Conduct requires that an employee must obtain approval to undertake remunerative work outside his duties for SARS. This

requirement is also contained in the SARS Internal Ethics Policy – Conflict of Interest. We requested confirmation from SARS on whether Makwakwa had been granted permission to undertake outside remunerative work in the period 2009 to 2012. We were instructed that Makwakwa was granted permission to conduct work outside SARS in 2008 and 2009 as a Member of the Body Corporate for Brooklands Lifestyle Estate. These two authorisations are attached marked annexure "E". No other "work outside SARS" application was received from Makwakwa.

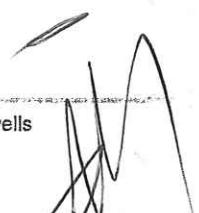
- (i) Makwakwa therefore was not authorised by SARS to undertake work for and on behalf of Biz Fire Worx.
- (j) A review of Makwakwa's directorships, memberships and properties was undertaken to determine whether full declaration of his private interests in other entities had been made by him as required by the aforementioned policies. A copy of these search results are attached marked annexure "F".
- (k) We established the following:

NO	DATE	WHAT WAS DECLARED	WHAT SHOULD HAVE BEEN DECLARED
18.	04 April 2011	Interest: JLCTM Dynamic Investments CC Properties Centurion	Interest: JLCTM Dynamic Investments. Properties: 38 Brooklands Ridge – registration date 18/04/2008 4 Lavender Lane – registration date 11/05/2009 2193 Kosmosdal – registration date 01/04/2005
19.	07 December 2012	Interest: Ottos Corner (Pty) Ltd Biz Fireworx (Pty) Ltd Properties : Makhado Local council	Interest: JLCTM Dynamic Investments Ottos Corner Biz Fire Worx (resigned) Properties: 38 Brooklands Ridge – 18/04/2008 4 Lavender Lane – 11/05/2009 2193 Kosmosdal – 01/04/2005
20.	26 April 2013	Interest : Ottos Corner	Interest: JLCTM Dynamic Investments

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		JLCTM Dynamic Investments CC  Kwakwa Investments (Pty) Ltd  Properties:  Makhado Location  Summerfield estate  Brooklands Estate 3	Ottos Corner  Properties:  38 Brooklands Ridge – 18/04/2008  4 Lavender Lane – 11/05/2009  2193 Kosmosdal – 01/04/2005
21.	01 April 2014	Interest - None  Property - None	Interest:  JLCTM Dynamic Investments  Ottos Corner  Kwakwa Investments  Properties:  38 Brooklands Ridge – 18/04/2008  4 Lavender Lane – 11/05/2009  2193 Kosmosdal – 01/04/2005
22.	15 April 2015	Interests:  International Frontier Technologies  Properties:  2193 Old wood street, 3 Rietspruit  4 Lavender lane, Summerfield  38 Brooklands Ridge, Kosmosdal  1382 Makhado Location, Limpopo	Interests  JLCTM Dynamic Investments  Ottos Corner  Kwakwa Investments  International Frontier Technologies  Property:  38 Brooklands Ridge – 18/04/2008  4 Lavender Lane – 11/05/2009  2193 Kosmosdal – 01/04/2005

22.1 It is clear from the comparative table above that Makwakwa failed to make disclosure as required. We therefore recommend disciplinary action be taken against him in this regard.



## RECOMMENDATIONS – MAKWAKWA

### Payments from SARS

23. There remains an amount of R162, 530.00 paid by SARS to Makwakwa that is unaccounted for.
24. We recommend that SARS scrutinise each of the unaccounted for transactions which are detailed on page 2-6 of the second PWC addendum, and request an explanation (along with supporting documents) from the finance department for each of these transactions.

### Cash Deposit Payments and Deposits

25. Ultimately the majority of the cash deposits and payments identified in the FIC report and highlighted therein as "suspicious and unusual" remained unverified.
26. The explanation tendered by Makwakwa in relation to the source of these deposits and payments are not satisfactory.
27. We note that notwithstanding Makwakwa's submission that as a result of his marital problems that commenced in and around 2012 he received financial assistance from his father to enable him to meet his rent and legal expenses, such assistance was on going and occurred on his version even as recent as 18 January 2016. Yet he was in a position to contribute R200 000.00 to the purchase of a luxury vehicle of his intimate partner, Elskie in May 2015 in circumstances where he relied on his father to pay his rent and legal fees. He was also in a position to provide his former PA with a loan of R10 000.00.
28. In 29 of the 76 transactions, Makwakwa made separate cash deposits on the same day at what appears to be the same banking location instead of depositing the cash into his account in one single transaction. This is suspicious and begs the question if it was done to avoid reporting thresholds.
29. When Makwakwa was probed to provide details in relation to the explanation provided on various sources of the income, he showed reluctance citing the need for an explanation of the investigators mandate. He surprisingly did so in circumstances where he had initially agreed to co-operate with the investigation and had already commenced putting together a comprehensive response when approached by the investigators. In fact, when the investigators mandate was questioned by Makwakwa he had already provided the investigators with a written explanation accompanied by documents. It was only when his explanation was tested by a request to provide clarity on some aspects of his version, that he questioned the investigators mandate.
30. Under the unfair dismissal jurisdiction of the LRA there is a duty to speak to avoid dismissal, even where there is no evidence directly linking any employees to alleged misconduct; i.e. the refusal to participate in an investigation amounts to misconduct.
31. That is because the implied contractual duty of trust, integrity and confidence imposes on employees a duty to speak, where their employer requires them to speak in an internal investigation to protect the employer's interests and assets, and where the employer has no information or no way of obtaining information about a threat to its interests and

assets.<sup>8</sup> It is arguable that Makwakwa's conduct in refusing to provide the clarity to his explanation constitutes misconduct.

32. SARS in its capacity as employer is limited in its ability to investigate an employee's sources of income. It is also limited in its ability to discipline an employee for unexplained sources of income in the absence of evidence that misconduct was committed.

33. This is an area within which the DPCI are best placed to investigate to determine whether the nature and source of the income is in contravention of any laws. As previously indicated, The DPCI are already undertaking an investigation in this regard.

34. Based on the information in our possession, there is no basis, save where indicated in our recommendations below, to make findings that Makwakwa committed misconduct arising from the receipt of the money (the 75 transactions and payment from Biz Worx).

35. We are mindful, however, that an investigation in respect of Request B is on-going. Should it be found in terms of Request B that a tax offence has been committed, this would constitute a breach of SARS's Code of Conduct. Clause 7 of this policy stipulates that SARS employees must ensure that they are at all times fully compliant with the tax and custom laws.

36. Similarly should the DPCI determine in Request A and D that criminal misconduct has occurred, this would similarly result in a contravention of clause 6 of the Code of Conduct.

37. From an employee misconduct perspective, the following has been noted which in our view warrants disciplinary action:

37.1 *Prima facie* contraventions of the:

- (a) SARS Internal Ethics Policy – Conflict of Interest. Failure to disclose private business interests, properties and rental income.
- (b) SARS Internal Ethic Policy – Conflict of Interest. Failure to obtain permission to undertake outside employment for Biz Fire Worx.
- (c) Failure to co-operate and fully assist his employer in an investigation.

37.2 Our recommendation is that SARS should take disciplinary action against Makwakwa arising from these contraventions.

#### ALLEGATIONS AND SUMMARY OF EMPLOYEE SUBMISSIONS

38. KA ELSKIE:

38.1 The FIC report notes that Elskie made three cash deposits totalling R450 200.00 into her personal bank account as follows:

- (a) R160 000.00 on 22 December 2015;
- (b) R160 000.00 on 23 December 2015; and
- (c) R130 200.00 on 24 December 2015

<sup>8</sup> FAWU v ABI [1994] BLLR 25 (LAC); Chauke v Lee Service Centre CC t/a Leeson Motors [1998] JOL 3076 (LAC)  
NUM v Besent [2010] ZALAC 12 (1 June 2010 – JA30/08); Western Platinum Refinery Ltd v Hlebela (2015) 36 ILJ 2280 (LAC)

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39. These funds were utilised to purchase a property alongside with the proceeds from a sale of a property.

40. The questions posed to Elskie and her responses are attached as annexure "G". In her response, Elskie indicated that the money was received from her mother, Ms Margaret Elskie.

41. The money was deposited in three separate transactions to avoid being 'mugged'.

42. *QMC* Her mother kept the total amount in cash in her home and not in a bank. Her mother obtained this money from three businesses she owned which she closed in 1990, 2000 and 2015. The money was generated from the liquidation of the stock and the sale of the property where the business was run.

43. Initially, Elskie alleged that her mother obtained part of the money from the proceeds of a sale of immovable property. However, upon further questioning, it was established that the proceeds from the sale of this property were received after the date of the three deposits.

44. In simple terms; Elskie's explanation is that her mother received the money from the sale of the stock of the three businesses which she closed.

45. In a meeting held on 23 January 2017 with the investigators and Elskie's attorney the following was confirmed: *Sharon*

45.1 The three businesses were run as sole proprietorships and accordingly no registration documents were available; and

45.2 Elskie's mother did not keep cash in a bank account.

#### FINDINGS AND RECOMMENDATIONS: ELSKIE

46. It is not possible to substantiate the claim that the amount of R450 200.00 was indeed received by Elskie from her mother.

47. At present there exists no basis, to hold that Elskie has committed misconduct in the employment context with the three deposits.

48. We are mindful however that an investigation in respect of Request B is on-going. Should it be found under Request B that a tax offence has been committed by Elskie, this would constitute a breach of SARS's Code of Conduct. Clause 7 of this policy stipulates that SARS's employees must ensure that they are at all times fully compliant with the tax and custom laws.

49. Similarly should the DPCI determine in Request A and D that criminal misconduct has occurred in which Elskie is implicated, this would similarly result in a contravention of clause 6 of the Code of Conduct.

#### CONCLUSION

50. There exists a *prima facie* basis to take disciplinary action against Makwakwa as stated above.

51. There does not exist at present (on the information in our possession) a basis to take disciplinary action against Elskie.

Hogan Lovells (South Africa)

16 May 2017

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" HLS "

**IN THE DISCIPLINARY INQUIRY  
HELD AT SANDTON**

In the matter between:

**SOUTH AFRICAN REVENUE SERVICES**

**Employer**

and

**JONAS MASHUDU MAKWAKWA**

**Employee**

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**FINDINGS**

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**1 INTRODUCTION**

- 1.1 These are findings in the disciplinary hearing between the South African Revenue of Services ("the employer") and Mr Jonas Mashudu Makwakwa ("the employee").
- 1.2 The employer has proffered six (6) allegations of misconduct charges against the employee.
- 1.3 The hearing was held on 27 and 28 July 2017 and again on 15 August 2017.

## 2 BRIEF BACKGROUND FACTS

- 2.1 On 15 September 2016, the employer served the employee with a notice of suspension. This was subsequent to the employer instituting an investigation around the Financial Intelligence Centre report dated 17 May 2016 ("FIC report").
- 2.2 The FIC report uncovered what it terms "seventy five (75) suspicious and unusual cash deposits and payments" made into the employee's bank account.
- 2.3 Though not directly relevant in these proceedings and for purposes of completeness, I must mention that the employee consented to the suspension but has since challenged its validity. That dispute had been referred to the CCMA.
- 2.4 The terms of the employee's suspension are as follows:
  - "a) *... you are hereby suspended for thirty (30) working days with full pay and benefits, pending the outcome of an investigation and/or subsequent disciplinary hearing.*
  - b) *You remain bound by all SARS policies and procedures as well as the SARS Code of Conduct and all other applicable policies and procedures.*

- c) *Although your services may not be required by SARS during your suspension period, you need to be available and contactable by SARS. You are required to furnish SARS with the address and contact details of where you will reside during your suspension period.*
- d) *You need to obtain permission from the SARS representative mentioned below before visiting any SARS premises or contacting SARS employees during working hours; and*
- e) *... ” (emphasis added)*

2.5 On 13 January 2017, the employee contacted Dion Nannoal (“Nannoal”) by way of a telephone call and the employer deemed that to be a breach of his suspension conditions.

2.6 The employer on 19 January 2017 served the employee with a charge sheet.<sup>1</sup> Later and on 12 June 2017, a consolidated charge sheet was served on the employee.

### 3 THE CHARGES

3.1 The following are the charges that were proffered against the employee:

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<sup>1</sup> For purposes of completeness, an investigation report compiled by the employer's attorneys of record, Hogan Lovells (South Africa) cleared the employee of any wrongdoing in respect of the seventy five (75) suspicious and unusual cash deposits and payments uncovered by the PWC report.



**"CHARGE 1: BREACH OF SUSPENSION CONDITIONS**

- 3.1.1 On 15 September 2016, you were placed on suspension.
- 3.1.2 One of the suspension conditions governing your suspension is that you are not to contact SARS employees without permission from Mr Tebogo Mokoena or Commissioner T Moyane.
- 3.1.3 On 13 January 2017 you telephonically contacted Dion Nannoolal and discussed a taxpayer and a current active tax matter.
- 3.1.4 Your conduct as set out above is in breach of your suspension conditions.

**CHARGE 2: GROSS INSUBORDINATION**

- 3.1.5 On 11 October 2016, you were reminded and instructed by Million Mbatha via email not to contact any SARS employees whilst you are on suspension.



3.1.6 Notwithstanding this instruction, you again contacted a SARS employee on 13 January 2017 as fully set out in charge one above.

3.1.7 Your conduct constitutes gross insubordination.

**CHARGE 3: FAILURE TO ACT IN THE BEST INTEREST OF SARS AND/OR PLACING SARS IN A POSITION TO BE BROUGHT INTO DISREPUTE**

3.1.8 Your suspension and the reasons that brought about your suspension have been the subject of wide media coverage.

3.1.9 Notwithstanding the media attention and your senior position within SARS, you proceeded to conduct yourself as set out in charge one and two above. As you are aware or ought to be aware should your conduct as aforesaid become publically known, it has the potential to place SARS into disrepute.

3.1.10 Your conduct has a potential of putting SARS into disrepute.

**CHARGE 4: ABUSE OF POSITION AND/OR EXERCISING UNDUE INFLUENCE**

3.1.11 In contacting Nannoolal as set out in charge 1, you sought to instruct and/or direct and or unduly influence Nannoolal in the performance of his duties. Nannoolal does not report to you.



3.1.12 You had no authority to direct, instruct or influence Nannoolal in the performance of his duties. Your conduct constitutes an abuse of your position as a senior SARS employee, and/or exercising influence on a SARS employee.

**CHARGE 5: BREACH OF SARS INTERNAL ETHICS POLICY –  
CONFLICT OF INTEREST AND CODE OF CONDUCT  
UNBECOMING CONDUCT AND/OR DISHONESTY**

3.1.13 On or about 8 February 2012 you were appointed as a director of Biz Fire Worx (Pty) Limited.

3.1.14 You failed to disclose to SARS, your appointment as director of Biz Fire Worx (Pty) Limited.

3.1.15 In representations made as part of an investigation you stated that you had provided the director of Biz Fire Worx, Lokisane Molea, with financial assistance and strategic funding, advice and planning, as well as supervision of staff.

3.1.16 Your conduct as aforementioned constitutes a breach of the Internal Ethics Policy well as the Code of Conduct in that you knowingly and/or deliberately and or in circumstances where you ought to have known you were required to disclose:



3.1.16.1 failed to disclose your appointment as director and/or directorship in Biz Fire Worx.

3.1.17 Your conduct as aforementioned constitutes a breach of the Internal Ethics Policy well as the Code of Conduct in that you knowingly and/or deliberately and/or in circumstances where you ought to have known you were required to obtain permission:

3.1.17.1 failed to obtain permission to undertake outside employment as required.

3.1.18 In addition, given your senior position within SARS, your conduct as aforementioned also constitutes conduct unbecoming of a person in your position and/or dishonesty.

**CHARGE 6: BREACH OF SARS INTERNAL ETHICS POLICY-  
CONFLICT OF INTEREST- FAILURE TO DECLARE  
IMMOVABLE PROPERTY AND RENTAL INCOME AND/OR  
UNBECOMING CONDUCT AND/OR DISHONESTY**

3.1.19 In terms of the SARS Internal Ethics Policy and established practice, you are required to disclose details of immovable property registered in your name and any rental income received in respect thereof.



3.1.20 In 2011 you failed to declare the following properties:

3.1.20.1 38 Brooklands Ridge

3.1.20.2 4 Lavender Lane

3.1.20.3 2193 Kosmosdal

3.1.21 In 2012 you failed to declare the following properties:

3.1.21.1 38 Brooklands Ridge

3.1.21.2 4 Lavender Lane

3.1.21.3 2193 Kosmosdal

3.1.22 In 2013 you failed to declare the following properties:

3.1.22.1 2193 Kosmosdal

3.1.23 In 2013 you failed to declare the following properties:

3.1.23.1 38 Brooklands Ridge

3.1.23.2 4 Lavender Lane

3.1.23.3 2193 Kosmosdal



3.1.24 In all the aforementioned years, you also failed to declare rental income received in respect of 4 Lavender Lane, Summerfield estate.

3.1.25 Your conduct as aforesaid constitutes a breach of policy and/or practice and given your senior position within SARS is conduct unbecoming of a person in your position and/or dishonesty."

#### 4 SUMMARY OF EVIDENCE

4.1 The employer called four (4) witnesses. The employee is the only one who testified on his behalf.

##### 4.1.1 Dion Nannoolal

4.1.1.1 He is a senior manager, High Value Enforcement Unit, which involves the collection of high value cases and litigation.

4.1.1.2 On 13 January 2017 at around 15h32, he received a call from the employee.

4.1.1.3 The employee advised him that he had received a call from Mr Rudzani Mukwevho ("Mukwevho"), a representative of the Mpisane family.

4.1.1.4 Mukwevho requested an urgent meeting with Nannoolal. However, due to the fact that he was on leave, he contacted the employee.

4.1.1.5 The employee requested that he meet with Mukwevho, as the Mpisane family needed their tax clearance certificate and wanted to settle their tax dispute with SARS.

4.1.1.6 The employee also mentioned the fact that Mukwevho raised the question of the assessment having been done by PriceWATERHOUSECoopers ("PWC") and not by SARS. Further that if it were true, that would have been irregular since such conduct would be contrary to the Tax Administration Act.

4.1.1.7 The employee was aware that he was on leave at the time and he apologised for disturbing him during his leave period.

4.1.1.8 He does not have the power to agree to settlement agreements and/or compromises.

4.1.1.9 He agreed to the meeting and requested that it must be held on Monday 16 January 2017 at 11h00.

4.1.1.10 But for the employee's request, he would have met with Mukwewho during the course of that week after attending to his emails and familiarising himself with the merits of the matter.

4.1.1.11 He sent a text message to Vusi Nqguluana and advised him that he had received a call from the employee in relation to the Mpisane matter.

4.1.1.12 The employee advised him not to do anything against the law when dealing with Mukwewho.

4.1.1.13 He acceded to the request because the employee is his superior and he has respect for him. However, he was not pressured into doing anything, i.e. acting in a particular way.

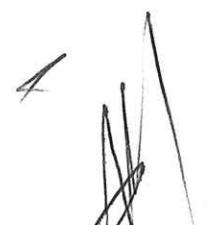
4.1.2 Mr Million Mbatha

4.1.2.1 He is an Employment Relations Specialist.

4.1.2.2 He was tasked with communicating with the employee regarding his suspension and the various extensions of the employee's suspension.

4.1.2.3 The employee was suspended due to allegations levelled against him emanating from the FIC report.

4.1.2.4 On 11 October 2016, he addressed an email in which he reminded the employee of his suspension conditions. The email was sent to the employee following the Commissioner's advice that the employee had attempted to contact him several times.



4.1.2.5 He had further communications with the employee, during his suspension, owing to the fact that he was tasked with handling the Lackay matter in which the employee was a witness.

4.1.2.6 The employee enquired whether in responding to Mbatha's messages, would he not be breaching his conditions of suspension.

4.1.2.7 He advised the employee on 26 of January 2017 by way of a text message that the employee was not breaching his suspension conditions when he communicates with him regarding the Lackay matter as that matter is not related to the FIC report investigation.

4.1.2.8 The employer has working hours that are published for office workers and they are 7h30 to 16h30 and 8h00 to 17h00.

4.1.3 Tebogo Mokoena ("Mokoena")

4.1.3.1 He is employed as the Chief Officer, Human Capital and Development.

4.1.3.2 He was involved in assisting the Commissioner, Thomas Moyane in issuing the suspension ("the Commissioner").

4.1.3.3 He became aware of the telephone call made by the employee to Nannoolal when he returned from leave.

4.1.3.4 He was the individual who was tasked with facilitating communication between the employee and the employer, regardless of the fact that the Commissioner had also been named as the other person with whom the employee could communicate.

4.1.3.5 The employee never requested permission from him prior to communicating with Nannoolal.



4.1.3.6 If permission had been requested from him prior to the employee communicating with Nannoalal, he would have considered the circumstances of the call, the basis of the request and if the employee has to contact any of his colleagues specifically who might have to deal with the relevant matters cited in the request. He would then make a determination as to whether or not to consult the line manager of the employee.

4.1.3.7 In response to the question that I had asked him as to whether was his authority to grant the employee permission to speak to SARS employees during his suspension was only limited to the issues stipulated in the notice of suspension, he responded in the affirmative.

4.1.3.8 This issue was explored by the employer's legal representative in an attempt to clarify his response to the question that I had asked him. He confirmed the correctness of the response that he had given. He later changed his answer when the issue was explored further.

4.1.3.9 With regard to the employee's suspension, it was decided that the employee be placed on suspension after having considered the seriousness of the allegations that had been raised against him and were being investigated. The employer was further guided by Disciplinary Code and Procedure Policy provisions dealing with suspensions.

4.1.3.10 He was asked about the limitation that is imposed by paragraph (d) of the notice of suspension, i.e. the one that refers to the working hours. His response was that:

*"MR MOKOENA: Firstly I, I do not thing that the working hour's limitation should find expression in that paragraph because it places an unrealistic limitation because working hours differ from one aspect of our operation to the other."*

4.1.4 Ms Tumelo Faith Gopane ("Gopane")

4.1.4.1 She a manager, Integrity Compliance Officer.

4.1.4.2 She is responsible for managing security vetting and conflict of interests at SARS.



4.1.4.3 All SARS employees are required to declare all their private interest on an annual basis between the period of April and May. The employees are further required to apply for permission if they wish to conduct work outside of SARS.

4.1.4.4 Employees are required to declare all their shares, directorships and partnerships in accordance with the Ethics Policy.

4.1.4.5 She was taken through the declaration on page 79 of bundle A and the following was her testimony:

4.1.4.5.1 She printed the document on 28 of October 2016 after she had been requested by management as it was relevant to an ongoing investigation.

4.1.4.5.2 The declaration of April 2011, for purposes of or under property, only refers to Centurion. It does not provide the details thereof.

4.1.4.5.3 The properties situate at 38 Brooklyn's Ridge, 4 Lavender Lane and 2193 Kosmosdal were not found in the declaration form submitted on 7 December 2012.

4.1.4.5.4 No property was found in the declaration form submitted on 26 April 2013.

4.1.4.5.5 No property was found in the declaration form submitted on 1 April 2014.

4.1.4.5.6 No rental income was declared for the years 2012 and 2013.

4.1.4.6 The employee did not obtain any approval from the employer for any extra remuneration.

4.1.4.7 If the employee had previously declared property in a certain year, that property will remain in the system however, under the profile of that specific year in which it was declared.



4.1.4.8 The system requires employees to annually either update the existing declaration, export the existing declaration or to create a new declaration.

4.1.4.9 The manner in which declarations is done is not prescribed by the policy. However, it is a rule that exists by virtue of the system used by the employer.

4.1.4.10 No action was taken against employees that had previously not declared.

4.1.5 Mr Jonas Makwakwa ("Makwakwa")

4.1.5.1 He is the Chief Officer, Business and Individual Taxes and has been in the employ of SARS for a period of twenty-two (22) years.

4.1.5.2 He first met the Mpisane family in March 2009 when he had been deployed to KwaZulu Natal to provide executive leadership.

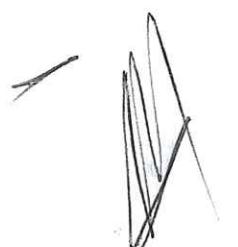
4.1.5.3 In the year 2012, he was a witness for the employer in the dispute it had against the Mpisane family.

4.1.5.4 He believes he was suspended because the FIC report had wide media coverage and thus his continued presence would cause unnecessary harm or attention to the employer.

4.1.5.5 From the reading of his notice of suspension, he was not permitted to contact and or access the employer's offices during working hours without obtaining permission.

4.1.5.6 He made a telephone call to Nannoolal after he received a call from the taxpayers' representative, Mukwevho, who advised him that he had been trying to make contact with the employer regarding the Mpisane matter. Mukwevho advised him that he urgently needed to meet representatives of the employer for the following reasons:

4.1.5.6.1 The Mpisane family urgently needed their tax clearance certificate.



4.1.5.6.2 The matter was set down in court for the next Tuesday and Mukwevho was aware of the PWC report together with the problem associated therewith.

4.1.5.6.3 The Mpisane family wanted to settle the matter with the employer prior to the scheduled court date and this is the reason that the meeting had to occur on Monday.

4.1.5.7 He did not think he was breaching his suspension conditions when he contacted Nannoolal as the latter was on leave, i.e. thus "working hours" were not applicable.

4.1.5.8 When a matter is the subject of litigation, no individual at SARS can settle a matter with a taxpayer. Any settlement and/or compromise is recommended by a committee known as a Tier 4 committee that makes recommendations to the Commissioner.



4.1.5.9 He was a witness on behalf of the employer in the Lackay matter. After Mbatha had contacted him, he sent a text message to Mbatha as he was not clear whether by communicating with him in relation to the Lackay matter, he was breaking his suspension conditions.

4.1.5.10 His understanding of the declaration system is that he is invited by the system and the system will have all the details and thus serve as evidence of the declarations of the previous years. The system will require him to either confirm the current information as it appears on the system or update the existing information that is on the system.

4.1.5.11 His further understanding was that he only needed to update the system if he wanted to include new declarations, i.e. those he had never previously declared.

4.1.5.12 Brooklyn Ridge and 4 Lavender Lane are investment properties from which he earns rental income.



4.1.5.13 He declared the following properties on the system:

4.1.5.13.1 2193 Kosmosdal - 2003.

4.1.5.13.2 38 Brooklyn Ridge and Lavender Lane - 2009.

4.1.5.14 He could not make any declaration during April/May 2012 as the system was not functioning at that time. He only had an opportunity to make a declaration when the system began operating in December 2012.

4.1.5.15 He was a director of Biz Fire Worx (Pty) Limited. The company was registered in February 2012 however, he could not declare in April/May of 2012 as the system was not functioning.

4.1.5.16 He is aware of individuals at the employer who had failed to make declarations in accordance with the policy and were never disciplined.



4.1.5.17 He underwent a vetting procedure in 2015.

4.1.5.18 He had the employer's best interest at heart when he made the call to Nannoolal. He would never allow the employer to be placed in a position of disrepute.

4.1.5.19 The reason why he called Nannoolal was because he wanted to avoid SARS being embarrassed in court again at the instance of the Mpisanes.

4.1.5.20 In response to a question that I put to him, he stated that the fact that he had made a call to Nannoolal in respect of matter of Mpisanes would have had negative consequences to SARS if that information had leaked.

A handwritten signature in black ink, consisting of a stylized 'J' or 'L' shape on the left, a vertical line with a loop on the right, and a series of diagonal and curved lines forming a signature.

## 5 SUMMARY OF THE PARTIES' SUBMISSIONS

### *The employer's submissions*

#### 5.1 Charges 1 to 3

5.1.1 The interpretation of the suspension conditions adopted by the employee is incorrect.

5.1.2 The employee knew he was required to obtain permission from Mokoena prior to making the call in issue and the employee did not obtain such permission.

5.1.3 The Chairperson should take into consideration the judgment of the Supreme Court of Appeal in Natal Joint Municipality Pension Fund v Endumeni Municipality<sup>2</sup>, that outlines the principles of interpreting written documents.

5.1.4 The employee's interpretation of his suspension conditions suggests that he may contact other employees without Mokoena's consent provided it is not during working hours.

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<sup>2</sup> 2012(4) SA 593 (SCA) at para [18]

Such interpretation, the employer contends, clearly undermines the purpose of the suspension.

- 5.1.5 To interpret the suspension notice in any other way would undermine the purpose of the document and lead to insensible and unbusinesslike results.
- 5.1.6 The employee does not dispute having received the email of 11 October 2016. He contends that he was not aware of the reason for the email, however does not dispute that he did in fact contact the Commissioner while on suspension.
- 5.1.7 The email of 11 October 2016 constituted a lawful and reasonable instruction and the employee's conduct poses a deliberate and serious challenge to the employer's authority.
- 5.1.8 The employee was aware that there would be negative consequences to SARS if the call became public knowledge. The fact that these negative consequences would arise if the information would be leaked was the employer's concerns.

5.1.9 There was subsequent negative media coverage relating to the employee breaching his suspension conditions and it being linked to the Mpisane matter.

5.2 Charge 4

5.2.1 There was in reality no need for the employee to intervene on behalf of the employer. The employer had already communicated with Mukwevho that they would not do anything until Nannoolal returned to work.

5.2.2 The employee sought to arrange a meeting with the employer on behalf of the taxpayer that would otherwise not have happened any time prior to the court date.

5.2.3 Nannoolal testified that it is out of respect that he acceded to the employee's request to depart from the employer's official stance and avail himself that would otherwise not have happened as early as it did.

5.2.4 It does not matter that Nannoolal testified under oath that he did not feel influenced by the employee. What matters is that the employee knew that he could influence Nannoolal to

deviate from the official stance of the employer and that he in fact did.

### 5.3 Charges 5 and 6

- 5.3.1 The employee did not disclose his appointment as a director and only disclosed his resignation as a director in December 2012.
- 5.3.2 Under cross-examination the employee conceded that if a person is appointed a director in August 2017, in terms of the Ethics Policy he must not wait until April 2018 to declare his directorship in the entity.
- 5.3.3 Full disclosure of private interest is key to the prevention of and in resolving situations of conflict of interest and upholding the integrity of the employer.
- 5.3.4 The message from the Commissioner that accompanied the Ethics Policy emphasises the importance of full disclosure by SARS officials and the context within which the Ethics Policy was drafted and its intended purpose. The message provides as follows:

*"Good corporate governance is far more important than legal obligation and oral duty for the employer; it is also a business imperative. The employer mission to broaden the tax base and promote voluntary compliance relies heavily on how well SARS looks after the public funds entrusted to it."*

5.3.5 The wording of paragraph 9.1 of the Ethics Policy clearly creates an obligation on the employer's official to annually submit a declaration from April and May. It creates a further obligation for the employer's officials to submit an additional declaration form as and when there are changes in the officials' private interests.

5.3.6 The reason for the employee's resignation as a director in May 2012, i.e that potential conflict of interest, demonstrates the importance of the obligation to declare changes in private interest as and when they occur as opposed to April and May when the annual declaration is submitted.

5.3.7 The employer submits that the employee should be found guilty of this charge.

5.4 Charge 6

5.4.1 The employee is a qualified auditor and a senior executive at the employer and yet expects the Chairperson to believe that he did not understand the policy to create an obligation on him to declare rental income.

5.4.2 The employee could not give an example of what would constitute "*other interests in land and property*". Therefore, the policy would have no practical meaning if the employee's interpretation were to be accepted.

5.4.3 At a factual level, the employee does not dispute that he did not declare rental.

5.4.4 Even though Gopane testified that it was her understanding that the Ethics Policy did not create an obligation on employees to declare rental income, this must not be accepted as the employer's position.

5.4.5 Our courts have been emphatic on this issue: the correct interpretation of any written document is "a matter of law and



not of fact and, accordingly, interpretation is a matter for the court and not witnesses”.

- 5.4.6 The employer submits that the employee is guilty of contravening the provisions of the Ethics Policy by failing to declare rental income for the immovable property situate at 4 Lavender Lane.
- 5.4.7 In addition to his failure to declare rental income, the employee failed to annually declare his ownership in certain immovable property during the years 2011, 2012, 2013 and 2014.
- 5.4.8 At a factual level, the employee does not dispute that he did not declare his ownership in these properties for the periods set out in the charge sheet.
- 5.4.9 The employee gave four versions during his testimony as to why he failed to annually declare his properties. These versions were that:
  - 5.4.9.1 He was obliged to declare repeatedly.

5.4.9.2 Interests previously declared appearing in subsequent forms as a result of a change of description of that interest.

5.4.9.3 Interests previously declared where there has been no change in the description appearing on the subsequent declaration form because of a change of an interest elsewhere on the form.

5.4.9.4 Not knowing why the system prints the information it prints at all.

6 The employer submits that the employee should be found guilty of all the aforementioned charges.

*The employee's submissions*

6.1 The charges were not drafted by the employer's employees. Neither Mbatha nor Mokoena drafted the charge sheet.

6.2 The employer's assertion that in terms of its Ethics Policy, the employee was obliged to declare his immovable property every year as well his



rental income, is a direct contradiction to the evidence that was given by Gopane, the employer's only witness with regards to charges 5 and 6.

- 6.3 No evidence was led to demonstrate any entitlement or authority to interpret the Ethics Policy any different from the interpretation given to them by their custodian, Gopane.
- 6.4 No evidence was led that the Ethics Committee had ever raised concerns with any of the employee's declarations.
- 6.5 If the employer's contention that interpretation is a matter of law and not of fact was to be accepted in the circumstances of this case, it would be prejudicial to the employee in that it:
  - 6.5.1 would entitle the employer to attach an interpretation that is at odds with the evidence that was given by its own witness; and
  - 6.5.2 undermines the employee's ability to raise a defence to these allegations.
- 6.6 This is in the context of the evidence that was given by Gopane to the effect that the policy imposes the obligation to declare and the system requires employees to declare annually.

- 6.7 An employee is entitled to be judged against a clear rule. It does not assist the employer to refer to cases on contractual interpretation.
- 6.8 The employee finds himself in the position where he is facing discipline flowing from an interpretation of policies.
- 6.9 Gopane's clear evidence is that the Ethics Policy does not oblige the employee to declare his rental income or to duplicate declarations.
- 6.10 Gopane further testified that there is disparity in how the Ethics Policy is applied.
- 6.11 No evidence was presented by the employer that the:
  - 6.11.1 employee's telephone call to Nannoolal related to his suspension or prejudiced the reason for which he was suspended;
  - 6.11.2 employee knew of the varied and conflicting interpretation of how he should understand the express prohibition in paragraph (d) of the suspension notice; and

6.11.3 employee was aware that the “*during working hours*” limitation in the prohibition was to be interpreted as broadly as suggested by the evidence of Mbatha or Mokoena.

6.12 Neither Mbatha nor Mokoena could establish the rule or standard with which rule the employee was required to comply.

6.13 Nannoal gave clear evidence that there was nothing untoward or improper with the call of 13 January 2017.

6.14 The employee had no entitlement or power to instruct, direct or influence Nannoal. The call had no material consequence and the taxpayers concerned could not gain any advantage as a result of the employee passing a message about a meeting to Nannoal.

6.15 There is no evidence of disrepute. The fact that the employee had been charged for a telephone call, the occurrence of which was leaked to the media, does not prove that the conduct was disreputable.

6.16 The employee was subjected to a vetting process and is in possession of a security vetting clearance and had never been denied such clearance.

6.17 A crucial determination is whether the evidence presented at the disciplinary hearing was sufficient to sustain charges proffered against the employee in terms of the guidelines laid down in item 7 of Schedule of the Labour Relations Act 66 of 1995 as amended.

6.18 The employee submits that the employer has failed to prove a *prima facie* case against the employee.

## 7 RELEVANT CONSIDERATIONS

7.1 Charges 1 to 4 essentially concern the following allegations:

7.1.1 The breach of the suspension conditions.

7.1.2 Gross insubordination.

7.1.3 Failure to act in the best interest of the employer and/or placing the employer in a position to be in disrepute.

7.1.4 Abuse of position and/or exercising undue influence.



*The breach of the suspension conditions*

7.2 In order for one to determine the veracity of the allegations relating to the breach of the suspension conditions, it is important that the principles relating to suspensions be understood. It is very often that suspensions get challenged and employers, when this happens, are called upon to justify their decisions to suspend employees.

7.3 In MEC for Education v Gradwell,<sup>3</sup> the court stated the following:

*"[24] The judge's conclusion that the MEC did not have 'an objectively justifiable reason to deny the employee access to the workplace' was predicated upon his findings that before such a course of conduct could be justifiable the MEC had to have taken a decision to conduct an investigation, and that in this instance the MEC had not done so. The requirement of paragraph 2.7(2) is that the employer should believe (reasonably) that the presence of the employee 'might jeopardise any investigation ...' The judge was of the opinion that if no decision to investigate is taken before imposing a suspension, then a condition precedent to the lawful exercise of the power has not been fulfilled. As he put it: 'there ought at least to be a decision to conduct the investigation before suspension is contemplated.' He found that the MEC decided to suspend the respondent before he took a decision to investigate and hence that the suspension was unlawful. The conclusion, in my view, sets the standard too high and is in any event factually erroneous.*

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<sup>3</sup> [2012] 8 BLLR 747 (LAC)

[25] *The learned judge based his factual finding on a sentence in the MEC's letter to the respondent dated 14 July 2010 which reads:*

*'Please note that a decision to investigate has not yet been finalised, but this office awaits your further input to consider whether grounds exist to suspend you on the basis of the allegations made and/or to further investigate the allegations received by this office.'*

*This statement cannot alone serve as categorical proof that the condition precedent had not been met. The wording of paragraph 2.7(2) does not unequivocally require the employer to take a conclusive decision to investigate before the power can be lawfully exercised. It is enough that any (current or future) investigation might be jeopardised. The use of the word "any" intimates that if an investigation is within contemplation the precondition will be met. The statement in the letter of 14 July 2010 makes it abundantly plain that such an investigation was being contemplated, but that due process required the respondent's input before a final decision was taken.*

[26] *But even were a decision to investigate a prerequisite to the lawful exercise of the power to suspend, the MEC averred, and the available evidence confirms, that such a decision was in fact taken prior to the suspension. In the letter of suspension dated and delivered to the respondent on 15 July 2010, the MEC stated:*

*'Consequently I have decided to commission a thorough and immediate investigation into the allegations of misconduct which are levelled against you in your capacity as Chief Director and acting Superintendent-General pertaining to the registration and funding of the Bessie Mpelegele Ngwane Care Centre, and all acts and omissions ancillary thereto. In an effort to allow the investigation process to continue without any real and/or perceived hindrance and/or influence on your part and on the basis of the seriousness of the allegations against you,*



*I have decided to invoke the provisions of Clause 2.7(2)(a) of Chapter 7 of the SMS Handbook ...'*

[27] *In the result, the learned judge's supposition that the suspension was unlawful, because there was no objectively justifiable reason to deny the applicant access to the workplace when no investigation was under way, was both legally and factually incorrect.*

[28] *Aside from that, the judge erred in his approach to determining the lawfulness of a suspension in terms of paragraph 2.7(2). His choice not to consider the serious allegations against the respondent was mistaken. As a general rule, a decision regarding the lawfulness of a suspension in terms of paragraph 2.7(2) will call for a preliminary finding on the allegations of serious misconduct as well as a determination of the reasonableness of the employer's belief that the continued presence of the employee at the workplace might jeopardize any investigation etc. The justifiability of a suspension invariably rests on the existence of a prima facie reason to believe that the employee committed serious misconduct. Only once that has been established objectively, will it be possible to meaningfully engage in the second line of enquiry (the justifiability of denying access) with the requisite measure of conviction. The nature, likelihood and the seriousness of the alleged misconduct will always be relevant considerations in deciding whether the denial of access to the workplace was justifiable.*

[29] ...

[30] *In the present case, the MEC's version sets out a detailed and compelling prima facie case of serious misconduct against the respondent. As discussed earlier, most of the allegations were not even canvassed, never mind denied, by the respondent in reply. The reasons he advanced for*

*not dealing with them are at best spurious, if not misleading. By the same token, the case made by the MEC that the respondent's presence at the workplace 'might jeopardize any investigation' was both logical and justifiable in light of the seriousness of the alleged misconduct. The complaint against the respondent includes the accusation that the respondent brought pressure to bear on his subordinates to act inappropriately and the assertion that he would be in a position to do so again were he to remain in the post."* (emphasis added)

- 7.4 It is from the prism of court decisions that deal with disputed suspensions that relevant aspects of this charge should be assessed and determined.
- 7.5 It is common cause that on 15 September 2016, the employee was served with a notice of suspension.
- 7.6 In terms of the employee's suspension conditions, he was advised not to contact any of SARS employees without obtaining permission from the employer's representative, Mokoena.
- 7.7 It is also common cause that the employee contacted Nannoolal on 13 January 2017, without obtaining permission.

7.8 The employee's suspension was effected in accordance with the employer's Disciplinary Code and Procedure. Clause 9 of the Disciplinary Code and Procedure records the following:

7.8.1 The employer may suspend the employee on full pay and benefits or transfer the employee pending an investigation for a period not longer than thirty (30) working days:

7.8.1.1 If the employee is alleged to have committed an offence that is of a serious nature.

7.8.1.2 To stabilise the working environment in order to conduct a proper investigation into the allegations levelled against the employee/s, and to avoid the potential tampering with evidence and/or interference with the investigation.

7.8.1.3 To minimise any risk and/or potential damage to SARS property and/or danger to the wellbeing of other SARS employees during an investigation.

7.8.1.4 To protect and secure witnesses and to avoid interference or intimidation of witnesses during the course of the investigation.

7.9 It is clear from clause 9 of the Disciplinary Code and Procedure that there is a requirement for there to be a nexus between an investigation and a suspension. I am of the view that it is the integrity of the investigation that the employer seeks to protect through restricting an employee's entitlement to communicate with fellow employees while on suspension, without obtaining permission.

7.10 Sensibly interpreted, the prohibition and the need to obtain permission provides the employer with a safety net through which it is able to supervise and preserve the aforesaid integrity of its investigation. This also enables the employer to protect potential witnesses by reserving onto itself the right to screen, assess and determine the prejudice, if any, that might ensue on account of permission that is requested by an employee on suspension, to contact a fellow employee.

7.11 It is for this reason that there is no total bar or absolute prohibition for a suspended employee to contact his/her fellow employees.

7.12 Where no harm or prejudice might be caused by such request, it does not seem that there would be a proper reason or basis for the employer to decline the request.<sup>4</sup>

7.13 This must be what informed Mbatha's response to the employee regarding whether he was breaking his suspension conditions by communicating with him with regards to the Lackay matter when he responded by stating that those are "two separate matters".

7.14 What should also not be ignored is the evidence of Nannoolal when he stated that firstly there was nothing untoward about the employee's call and secondly, that the employee advised him not to do anything unlawful in his handling of the matter.

7.15 In addition, it is important to note that the subject of the telephone call did not concern the issue for which the employee had been suspended, i.e. the FIC report or investigations in respect of issues relating to his alleged non-declaration, assuming that he was aware that this too was a reason for his suspension.

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<sup>4</sup> Sizwe Morgan Mayaba v Commission for Conciliation Mediation and Arbitration ZALCJHB, 364 at para 41 where the court mentioned the question of integrity and the fact that its protection is one of the purposes of the suspension.

7.16 For one to determine whether the employee breached the conditions of his suspension, it will also be necessary to consider the meaning of the words “working hours”.

7.17 It was not disputed that when the employee contacted Nannoolal he was aware that Nannoolal was on leave.

7.18 The word “leave” is defined, accordingly to the South African Concise Oxford Dictionary to mean “time when one has been given permission to be absent from work or duty.”

7.19 Condition (d) of the Conditions of Suspension imposes a restriction or prohibition on the employee to not contact SARS employees “during working hours”.

7.20 I am of the view that read both sensibly and purposively, the prohibition that relates to “working hours” cannot apply to an employee that is on leave since by its very definition, the word “leave” as already indicated hereinbefore, authorises an employee to be absent “from work or duty”.

7.21 It thus cannot, in my view, be said that although an employee has been given permission to be absent from work or duty, their hours while on leave, should be interpreted to constitute “working hours”.



7.22 A different way to interpret the words "working hours" is for one to approach it on the basis that those are the hours that an employee dedicates and/or devotes to an employer. That cannot be said to be the case where an employee is on leave. That is their own time.

7.23 For these reasons, I conclude that when an employee is on leave, their time does not qualify as time dedicated and/or devoted to an employer. I accordingly do not consider same to constitute "working hours".

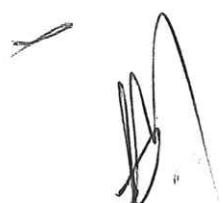
*Gross Insubordination*

7.24 The allegation is that on or about 11 of October 2016, Mbatha sent an email to the employee. The email referred to the suspension conditions contained in the suspension notice dated 15 September 2016.

7.25 The employer led evidence that the email was sent as a result of the Commissioner having receiving calls from the employee during his suspension.

7.26 The employer contends that the email from Mbatha served as a lawful instruction to the employee and the employee failed to adhere thereto.

7.27 Having already found that contacting an employee that is on leave does not amount to contacting such an employee during his "working hours",



it follows that by contacting Nannoolal, the employee's conduct does not amount to insubordination, let alone gross insubordination.

*Failure to act in the best interest of the employer and/or placing the employer in a position to be in disrepute*

7.28 The employer alleges that the telephone call made by the employee to Nannoolal had the potential of placing it in disrepute and further that the employee's actions did not safeguard the employer's best interest.

7.29 The employee conceded that had someone leaked the information that he made a call to Nannoolal, the matter would receive negative media attention.

7.30 In terms of the South African Concise Oxford Dictionary already referred to hereinabove, the word "disrepute" is defined to mean "the state of being discredited".

7.31 When applied to the charge, it means that the employee is being charged with conduct that could potentially cause the employer to be discredited. This is premised on the telephone call that he made to Nannoolal and the potential of that fact, i.e. that he had called Nannoolal, being leaked to the members of the public.

7.32 It is important to consider the fact that if SARS had indeed been put into disrepute on account of the employee calling Nannoolal, it could have exercised its prerogative of discipline by charging the employee with such conduct.

7.33 SARS did not charge him the employee's conduct putting it into disrepute. It charged him with a potential of putting it into disrepute.

7.34 If the charge had been that of actually putting SARS into disrepute, principles such as those that were referred to in the matter of HRP Distribution v National Bargaining Council for the Road Freight Industry and Two Others,<sup>5</sup> where the following was stated:

*"[19] In this regard, the present circumstances are far removed from those in Timothy v Nampak Corrugated Containers (Pty) Ltd -- a case on which Mr Jackson relied. In Nampak, the employee had been dismissed for having *inter alia* impersonated an attorney, acting dishonestly and bringing his employer into disrepute. That could hardly be equated with sending a few salacious emails to a customer's employee 'to make her jealous', as was Clayton's intention. As Davis JA said in Nampak:*

*'A reasonable decision maker would have engaged in an objective evaluation as to whether the employee brought the company into disrepute. An objective test enjoins an examination, in all the circumstances, of the nature of the*

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<sup>5</sup> [2013] 3 BLLR 283 (LC)

*conduct, evaluates the turpitude and seriousness thereof and then makes an evaluation as to whether the charges can be sustained.'*

*[20] In this case, the employee's actions, albeit childish and deliberate, are not of such a serious nature that it can be said to have brought the company into disrepute. It does not equate to 'turpitude', i.e. depravity or base action of the kind that would bring the company (as opposed to the employee) into disrepute."*

would have become applicable.

7.35 If the employee had been charged with having actually brought the employer into disrepute through making this phone call, his conduct would have had to be examined through an objective test as alluded to in the above legal authorities and to determine whether, as a matter of fact, his conduct did bring the employer into disrepute.

7.36 In such an instance, the presence or absence of the element of turpitude would have had to be examined.

7.37 Having regard to both the evidence of the employee and that of Nannooolal, taking into account what the subject matter of the conversation was about, it cannot be disputed that the totality of the evidence does not exhibit the presence of turpitude. To the contrary, it does not.



7.38 I am mindful of the fact that the employee was only charged with the potential and not actually bringing the employer into disrepute. I am also mindful of the fact that the employee admitted that if the fact that he had made a telephone call had leaked, it would have had negative consequences for SARS. However, that would not have been the end of the matter. If SARS was aggrieved thereby and having been satisfied that such conduct did put it into disrepute, it would have so charged the employee.

7.39 It is also important to have regard to the fact that one of the complaints by the employer regarding this conduct is that the employee failed to act in its best interest.

7.40 In this regard, the employee stated that when he made the telephone call, he was motivated by the employer's best interests and the desire to avoid a repeat of SARS being embarrassed at the hands of the Mpisanes.

7.41 The employer states that there was no need for the employee to intervene since its interests were not at risk, for the reasons stated hereinearlier.

7.42 What the employer's evidence does not show however is that the employee knew that the employer's interests were not and could not have

been at risk at the time that he made the telephone call but proceeded to call Nannoolal, nonetheless.

7.43 Given the fact that what is stated in paragraph 7.42 above does not arise in this case, it begs the question whether the employee's explanation regarding his motive for making the telephone call can be dismissed or rejected out of hand. If so, does the evidence point to any other motive and what is it?

7.44 It is common cause that Nannoolal had no authority to settle with the taxpayer and that no attempt was made by the employee to either instruct or influence him to settle with the Mpisanes. To the contrary, he was expressly told not to act contrary to the law.

7.45 It is clear that by telling Nannoolal not to act contrary to the law, the employee was making it plain to him that the Mpisanes should not gain any unfair advantage in how Nannoolal was going to deal with the matter, flowing from that telephone call.

7.46 Nannoolal did not give evidence that the employee unduly influenced him in the performance of his duties. The sum total of the action that was taken by Nannoolal consequent or premised upon the telephone call that he received from the employee, was to arrange a meeting on Monday as

both he and the employee were not aware that the court matter that was set down for the following Tuesday, was no longer going to proceed.

7.47 I accept Nannoolal's evidence that but for the telephone call, he would not have scheduled the meeting for the Monday. However, that evidence must be viewed in the totality of the context of the entirety of his evidence. Although this meeting was convened on Monday, it was called or arranged in circumstances where the employee had made it clear and Nannoolal also understood that lawful conduct was expected on his part in dealing with the matter.

7.48 Our law often refers to the trite principle that where there is cause but no effect, that conduct is not actionable. By way of example, if there is a collision between two vehicles and one of them was driving at 120 kph in a 60 km zone, it does not follow that proving this fact establishes causality. Causality will still have to be established at a factual level.

7.49 The same principle applies here in that the calling of such a meeting without any undue influence, exerting of authority and no instruction for any unlawful advantage to be secured on behalf of the Mpisanes, amounts to cause without any effect.

7.50 I accordingly find that there is no basis to reject the employee's evidence read together with that of Nannoal, that he was motivated by the employer's best interests when he made the telephone call.

7.51 It accordingly follows that the employee's conduct does not constitute an abuse of his position and/or an attempt to exercise improper influence, let alone influence on a SARS employee. I elaborate further hereinbelow.

*Abuse of position and/or exercising undue influence*

7.52 In dealing with this allegation, regard must be had to the following:

7.52.1 Nannoal in his evidence testified that he did not feel pressured by the employee.

7.52.2 The employee advised him to act in a lawful manner in his handling of the matter.

7.52.3 There was nothing untoward with the call from the employee.

7.52.4 The employee is not his direct line manager.



7.52.5 He does make settlement agreement and/or compromises with the taxpayer. A committee named Tier 4 is vested with that authority.

7.52.6 He acceded to the request of the employee because he respects the employee however, he advised that he would act in the same manner had he been requested by other colleagues of his who are also involved in the Mpisane matter.

7.53 The employer's contention that the employee intended to pressurise Nannooolal, irrespective of whether Nannooolal felt that he was being pressured to act in a particular manner or not, is difficult to sustain based on the aforementioned objective facts.

7.54 There is simply no basis to find that the employee intended to pressurise Nannooolal and/or abused his position and/or exercised undue influence in circumstances where no direct or meaningful outcome to the benefit of the taxpayers could be obtained by virtue of that telephone call. I accordingly reject the employer's contentions in this regard.

*Charges 5 and 6 relate to the employee's failure to make certain declarations as prescribed by the Ethics Policy*

7.55 It is alleged that the employee failed to disclose the following:

7.55.1 His investment properties as recorded under charge 6 above.

7.55.2 His rental income in respect of the abovementioned properties.

7.55.3 His directorship position at Biz Fire Worx (Pty) Limited.

7.56 The employer deems same as a violation of clause 9 of the Ethics Policy as well Clause 5 of the Ethics Code of Conduct.

7.57 Gopane under cross-examination conceded to the following:

7.57.1 The repeated declarations are not prescribed by the Ethics Policy.

7.57.2 It is a rule of the system utilised by the employer that there be repeated declarations.

7.57.3 The system was not functioning from April 2012 until December 2012.

7.57.4 The Ethics Committee would address correspondence highlighting an employee's non-compliance with the rules.



7.57.5 There are numerous other employees who had not declared their properties and assets, however they were not subjected to such disciplinary processes.

7.58 It is common cause that the employees are required to declare their assets and further required to request permission prior to engaging in any work outside of the employer in order to avoid possible conflict of interests.

7.59 The employee in his evidence admitted the following that:

7.59.1 he was indeed a director at Biz Fire Worx (Pty) Limited;

7.59.2 the company was registered in February 2012 and he resigned in May 2012;

7.59.3 he could not declare because in April the System was not functioning;

7.59.4 he had declared his properties previously and was not aware that he had to declare annually;

7.59.5 he was subjected to a security vetting procedure and he obtained the security vetting clearance certificate in 2015; and

7.59.6 he did not know that he was supposed to declare his rental income.

7.60 There is confusion regarding how the system of declaration operates and what was required of the employees.

7.61 The employer contends that the evidence of Gopane should be ignored and that since interpretation is a question of law and not of fact, the question should be determined purely by way of an interpretational exercise.

7.62 While I agree with the employer that interpretation is a question of law and not a question of fact, contextual evidence based on decisions such as that of Natal Joint Municipal Pension Fund *supra* and Bothma-Batho Transport (Edms) Bpk v S Bothma and Seun Transport (Edms) Bpk,<sup>6</sup> is permissible in the process of interpretation.

7.63 Insofar as the allegation of failure to declare is concerned, the question of the correct interpretation does not become relevant in the circumstances of this case due to the fact that both on the version of the employer per

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<sup>6</sup> 2014 (2) SA 494 (SCA) at paras [10]-[12]

the evidence of Gopane and that of the employee, no punishment was meted out against employees that had failed to declare in the past.

7.64 Due to the fact that the employer's witness is the one that referred to this fact and no other witness was called by the employer in an attempt to correct that evidence and/or to present different facts in that regard, the employee does not need to satisfy the requirements set out in the matter of ABSA v Naidu,<sup>7</sup> where the court makes it clear that in seeking to invoke the parity principle, an employee must do more in an effort or attempt to demonstrate that the case(s) he/she seeks to rely upon, are indeed comparable to the allegations of misconduct with which he/she has been charged.

7.65 It is important to bear the following four tenents or pillars on which the process of discipline rests:

7.65.1 There must be a rule.

7.65.2 The rule must be known.

7.65.3 The rule must have been breached.

7.65.4 The rule must be consistently applied.

7.66 On the basis of the evidence presented in respect of failure to declare, I find that by charging the employee, the employer has inconsistently applied discipline and for that reason, there is no basis to find the employee guilty of that charge.

7.67 The existence of the requirement for the employee to obtain permission to undertake outside employment is common cause together with the fact that it was not complied with. The purpose of requesting and obtaining permission for engaging in any work outside of that of the employer is for purposes of avoiding possible conflict of interest.

7.68 The employee has given evidence regarding the security vetting procedure and the security vetting clearance certificate that he obtained pursuant thereto. He gave evidence that anything that he did not declare that he was required to declare, would have been detected in that process. The fact that he was furnished with a security vetting certificate is indicative of the fact that there was no transgression on his part.

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<sup>7</sup> [2015] 1 BLLR 1 (LAC) para 36

7.69 Although the employee did not disclose his appointment as a director of Biz Fire Works (Pty) Limited, he declared his resignation.

7.70 In all instances of non-declaration on which the employer seeks to rely, it is important to note that there are none that the employer established of its own accord, that are not on its system.

7.71 The complaint is either that of failure of declaring repetitively or declaring the resignation in circumstances where the appointment as a director had not or was not declared.

7.72 It would be artificial to seek to distinguish between not having declared the appointment as a director and failing to request permission prior to engaging in work outside of that of the employer in order to avoid possible conflict of interest. The fact of the matter is that it is his appointment as a director that enabled him to or through which he performed work outside of that of the employer. In this instance, the two acts are inextricably linked and the splitting is impermissible since the one is a consequence of the other.

7.73 Accordingly, having found that the employee should not be held responsible for his failure to declare in circumstances where other

employees had also not declared in the past and no disciplinary action was taken against them, I also find the employee not guilty in this regard.

7.74 In addition, I also find that there is no evidence that establishes conduct that is either unbecoming and/or dishonest on the part of the employee.

## 8 CONCLUSION

For the reasons set out hereinabove, I find the employee not guilty of all of the charges that are levelled against him.



TERRY MOTAU SC

Chambers  
SANDTON

13 October 2017





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# Hogan Lovells' role in the Makwakwa investigation

3 November 2017

South Africa

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Hogan Lovells was instructed by South African Revenue Services (SARS) in October 2016 to conduct an independent investigation into allegations against Mr Jonas Makwakwa and Ms Kelly Ann Elskie. This was in response to a report by the Financial Intelligence Centre (FIC), which identified various financial transactions involving Makwakwa and Elskie, which the FIC deemed to be suspicious or unusual.

The scope of the investigation conducted by Hogan Lovells was limited to identifying whether any misconduct had been committed by Makwakwa and Elskie as employees of SARS. It did not seek to directly investigate the financial transactions identified by the FIC. We understand that all criminal related allegations arising from the FIC report were referred to the relevant authorities for investigation.

As a result of that independent investigation, Hogan Lovells produced a report which contained recommendations for the management of SARS. One of those recommendations was that disciplinary action should be taken against Makwakwa for non-disclosure of external interests. No action was recommended against Elskie. SARS subsequently followed its own internal disciplinary procedures which included charges relating to Makwakwa's breach of his suspension conditions and the failure to disclose. A hearing was convened and chaired by an independent senior counsel, Advocate Terry Motau SC. The findings of that internal enquiry acquitted Makwakwa of all charges.

## Contacts



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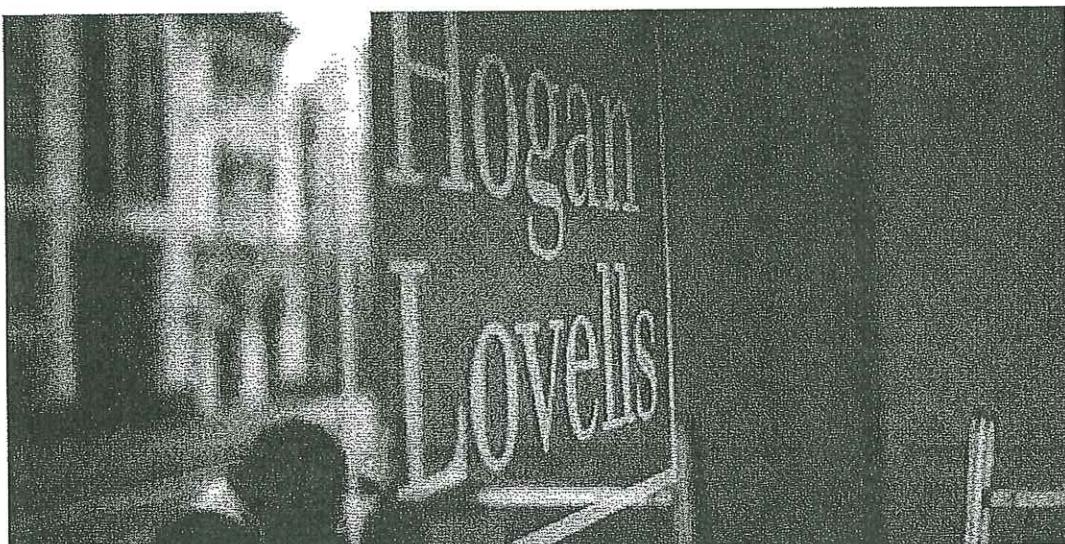
SARS  
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NEWS 05/12/2017 13:13 SAST | Updated 05/12/2017 13:14 SAST

## Full Statement: Hogan Lovells Clarifies Its Role In Investigating Sars' Jonas Makwakwa

Makwakwa had been red-flagged by the money-laundering authorities for suspicious deposits worth millions of rands into his personal accounts made over six years.

By Staff Reporter



UNITED PROPERTY INVEST

### STANDING COMMITTEE ON FINANCE

IN RE: MR MASHUDU JONAS MAKWAKWA: 5 DECEMBER 2017

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.

**READ: Hawks Investigating Money-Laundering By Top SARS Man**

**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.

---

Lavery Modise

Chairman

Hogan Lovells (South Africa) Inc.

4 December 2017

[Suggest a correction](#)

Staff Reporter

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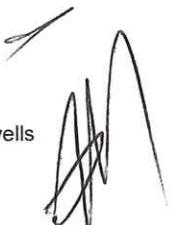
STANDING COMMITTEE ON FINANCE (SOUTH AFRICAN REVENUE SERVICES)

IN THE MATTER OF MR MASHUDU JONAS MAKWAKWA: 23 MAY 2018

Good morning Chairperson and Honourable members of the Standing Committee,

1. Thank you for asking Hogan Lovells to attend this open session and to answer your questions on our Report.
2. I have previously publically stated that I wanted our confidential and privileged Report to be made public, but that it was for SARS to waive its attorney client privilege. I am delighted and somewhat relieved that SARS has released our Report to this Standing Committee and that you are now giving us this opportunity to publicly answer your questions on our Report.
3. Our Report is the significant missing piece of the puzzle that I hope emphatically and finally puts an end to any further speculation about Hogan Lovells' role and involvement in the Makwakwa Disciplinary Inquiry.
4. Any statement that Hogan Lovells' investigation extended into allegations of criminal conduct or tax evasion on the part of Makwakwa and arising from the FIC Report, is misleading and incorrect.
5. Our Letter of Engagement (which is public and attached to a December 2017 Daily Maverick article) made it clear upfront, and this is now confirmed by our Report, that our labour-related investigations in relation to Makwakwa were focussed on whether any of the suspicious, unusual or *ad-hoc* payments identified in the FIC Report were a breach by Makwakwa of SARS' internal policies and/or the Public Finance Management Act – in other words, whether it amounted to misconduct in the employment context. Investigations into criminal conduct and tax evasion had to be made by the Hawks and SARS within their respective statutory and constitutional mandates and were not matters that Hogan Lovells could legally attend to.

6. Our Report clearly and unequivocally follows our Letter of Engagement.
7. The Disciplinary Inquiry itself was therefore a properly convened Disciplinary Inquiry at the time, consistent with labour laws, our Letter of Engagement and the express recommendations contained in our Report, to address only the specific labour-related matters that Hogan Lovells was legally permitted to investigate and address.
8. In this context, our Letter of Engagement, our Report and the Disciplinary Inquiry were not on any stretch of the imagination part of a masterfully designed "*whitewash plot*" to ensure that Makwakwa was permanently re-instated, as suggested by some in the media, who unfortunately did so without the benefit of studying our Report.
9. Advocate Motau SC, who chaired the Disciplinary Inquiry, found Makwakwa not guilty of the charges, after having considered the admissible evidence led by SARS and the defence put up by Makwakwa, who was represented by his attorneys and his advocate during this process. This resulted in the return of Makwakwa to his position at SARS.
10. It is clear from our mandate set out in our Letter of Engagement and our Report that there is still a series of critical outstanding parallel investigations being conducted by the Hawks and SARS into Makwakwa's conduct in relation to the unusual, suspicious and *ad hoc* payments identified by the FIC. The outstanding criminal and tax evasion investigations, which can only lawfully be conducted by the Hawks and by SARS, once concluded, may well lead to further separate charges of criminal conduct or tax evasion being prosecuted in a competent Criminal Court or Tax Court, against Makwakwa.
11. Having regard to the outstanding investigations, although Makwakwa has now resigned from SARS, this does not mean that he has escaped justice as he may still face prosecution in a Criminal Court or Tax Court on possible future criminal charges or tax evasion charges.



12. Against this background, I turn now to address some specific accusations and criticisms publicly levelled at Hogan Lovells, which I anticipate you may want to ask me about, and which we can now answer as both our Report and the terms of the Disciplinary Inquiry are in the public domain.
13. We have been accused of "*tailoring*" our Letter of Engagement to deliberately limit our investigations and the resultant charges that could be put to Makwakwa at a "*questionable*" or "*whitewash*" or "*cooked*" Disciplinary Inquiry. Our answers to this are that:
  - 13.1 It is not Hogan Lovells, but it is the law, that dictates that the Hawks (not Hogan Lovells) are lawfully entitled and best suited to investigate alleged criminal activities or activities where individuals are obstructive, and to procure admissible evidence for possible prosecution in a Criminal Court, which can then be used in a Disciplinary Inquiry.
  - 13.2 It is likewise dictated by law that SARS (not Hogan Lovells) is entitled to investigate any alleged tax evasion and to procure admissible evidence for possible prosecution in a Tax Court.
  - 13.3 Therefore any statement that Hogan Lovells "*tailored*" its Letter of Engagement is incorrect and wrong in law.
14. We have been accused of not putting all possible available charges arising from the FIC Report to Makwakwa at the Disciplinary Inquiry and not levelling charges against Makwakwa based on PwC's Source of Funds Report. Our answers to this are that:
  - 14.1 All possible charges available at the time, within the scope of our Letter of Engagement and as expressly recommended in our Report, were put to Makwakwa at the Disciplinary Inquiry.

14.2 As background, PwC forensics was appointed by Hogan Lovells to conduct a forensic investigation to make factual findings as to the identity of the source of funds in relation to payments identified as suspicious, unusual or *ad hoc* in the FIC Report, which identification would assist Hogan Lovells to determine whether or not Makwakwa had breached any SARS internal policies and/or the Public Finance Management Act, as we were required to do in our Letter of Engagement.

14.3 The PwC Source of Funds Report provided to us was inconclusive as to the facts relating to the identity of the source of funds, because:

- (a) SARS in its capacity as employer was limited in its ability to investigate an employee's sources of income;
- (b) Makwakwa was to a degree uncooperative in the Hogan Lovells and PwC separate investigations on this aspect; and
- (c) the Hawks were best placed with the necessary powers to investigate the nature and source of the funds and their investigation was not complete.

14.4 It is a question of law whether or not inconclusive findings of fact as contained in the PwC Source of Funds Report would justify any charge at a Disciplinary Inquiry relying on the identity of the source of funds to substantiate the charge. In our professional opinion it did not; and so in discharge of our ethical and professional duties we recommended in our Report that charges that could not be substantiated by the facts should not be put to Makwakwa at the Disciplinary Inquiry.

14.5 In a perfect world, the Hawks and SARS would have ideally concluded their respective investigations by the time of the Disciplinary Inquiry and provided



conclusive admissible evidence of the identity of the source of funds and criminal-related activities or tax evasion, but they had not.

- 14.6 From a timing perspective, Makwakwa had in February 2017 strategically launched a CCMA application to declare his indefinite suspension an unfair labour practice which hearing was initially set down for 29 June 2017. In any event SARS (as Employer) could not in terms of labour law place Makwakwa (as Employee) under precautionary suspension in September 2016 and then indefinitely delay putting valid charges with reasonable prospects of success to him at a properly convened Disciplinary Inquiry. So it was necessary not to delay the Disciplinary Inquiry, but to proceed with all possible charges against Makwakwa at the time, as expressly recommended in our Report.
- 14.7 At the time of the Disciplinary Inquiry, there was no admissible evidence available to support any charge with any reasonable prospects of success at the Disciplinary Inquiry based on the identity of the source of funds and/or any alleged criminal activities or tax evasion activities.
15. We have been accused of not demanding that SARS provide us with the PwC Tax Evasion Report because surely that report would have constituted admissible evidence of tax evasion and a dismissible offence; and SARS not providing that report to us should surely have been a "*red flag*" for us. As background, SARS had outsourced the tax evasion investigation in relation to Makwakwa as a taxpayer to PwC because of his seniority and conflicts with having other SARS employees investigate such a senior employee. The PwC Tax Evasion Report therefore constitutes a part of SARS' investigation into any alleged tax evasion. Our answers to this are:

- 15.1 First, that the matter of investigating and prosecuting any alleged tax evasion was not, as a matter of law, part of our role under our Letter of Engagement and so it was not, and could not have been, a "*red flag*" for us.

15.2 Second, SARS is the competent authority lawfully required to investigate and prosecute any alleged tax evasion by a taxpayer. SARS has no obligation to provide any confidential information relating to any taxpayer to any person.

15.3 Third, Hogan Lovells does not have any right to demand any confidential information about any taxpayer from SARS, nor did we have any expectation to receive any such information. As mentioned above, at the time of the Disciplinary Inquiry SARS as the competent authority had not initiated the prosecution of any alleged tax evasion activities on the part of Makwakwa and so, as contemplated by our Letter of Engagement, there was at the time of the Disciplinary Inquiry no charge available to be put to Makwakwa (as employee) based on any alleged tax evasion.

16. We have also been accused of being involved in a "*questionable*" or "*whitewash*" or "*cooked*" Disciplinary Inquiry because statements have been made and an impression has been created by some in the media that Hogan Lovells investigated "*all*" the possible charges arising from the FIC Report, and put "*all*" possible charges to Makwakwa at the Disciplinary Inquiry, and the Disciplinary Inquiry then exonerated Makwakwa of "*all*" possible charges from the FIC Report, and that is therefore the end of all the matters and Makwakwa could be permanently re-instated. Our answers to this are that:

16.1 Having regard to the above background and context, including the reality that there are still outstanding investigations into Makwakwa's conduct by the Hawks and SARS as outlined in our Letter of Engagement and our Report, it is clear that such statements and "*impression*" are simply wrong.

16.2 It follows that any reliance on any such misstatements and impression is either a mistake or cynically deliberate.



17. In order to assist the Standing Committee with the series of events and documents, I have set out below a brief chronology of events and documents, which contextualises the matter and which I incorporate below in my statement for your convenience.
18. Mr Chairperson and Honourable Members of the Standing Committee, in conclusion, Hogan Lovells has prior to and since my appearance before this Standing Committee on 5 December 2017 been under immense public attack by persons who did not have all the facts, who in some cases did not care what the facts were or chose to ignore the facts, or who simply insisted that we as lawyers should break our legal, ethical and professional obligations, and apologise and "*come clean*" as regards our role in the investigations relating to Makwakwa and his re-instatement.
19. As attorneys we are required to fulfil our professional role without fear or favour and to do so at all times honestly, ethically and professionally, which we have done. We do not take our professional obligations lightly. We have not been tempted, nor have we succumbed, to immense pressure by politicians, individuals or the media to breach our professional obligations – if I did so, I would no doubt have been sanctioned by our Law Society and would possibly have been struck off the roll of practicing attorneys.
20. We fully respect and salute the efforts of professional investigative journalists and all the good work they do and continue to do for all of us South Africans. Regrettably, however, information and documents in the Makwakwa matter have been leaked to the media piecemeal and selectively. For very good reasons, and as part of a developed legal system, we as attorneys are bound not to disclose to the third parties our Client's confidential and privileged documents. This, unfortunately, has created a platform for rife speculation in the media targeting Hogan Lovells.
21. Fundamental to our democracy is the rule of law. This means that even in the case of Makwakwa, like any other citizen and employee, he is entitled to due process and not to have unsubstantiable charges prematurely put to him at a Disciplinary Inquiry hastily

convened to satisfy populist but dangerous activism. Sometimes, frustratingly for all of us as it may be, the wheels of justice grind slowly.

22. As lawyers our fundamental professional role, no matter how unpopular it makes us in the public eye, is to uphold the Rule of Law and apply due process, including professionally assessing all the available admissible evidence lawfully procured against the likes of Makwakwa and presenting a substantiable case with reasonable prospects of success to an independent Chair at a Disciplinary Inquiry. In dealing with the role of lawyers in our society, former Chief Justice Arthur Chaskalson stated that:

*"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."*

23. We trust that now with the release by SARS of our Report all speculation about our role in relation to the Disciplinary Inquiry can finally be explained, and that all notions that the Disciplinary Inquiry was "questionable" or a "whitewash" or "cooked", can now be put to rest.
24. I hope that my opening statement has answered all of your questions to your satisfaction. My colleague, Mr Wessel Badenhorst and I are happy to answer any questions you may have for us.

**Lavery Modise  
Chairman  
Hogan Lovells (South Africa) Inc**

23 May 2018

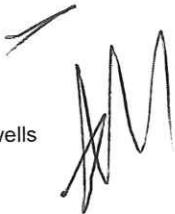
## CHRONOLOGY OF MATERIAL FACTS

Item	Date	Event	Reference
1.	17 May 2016	FIC sends FIC report to SARS, Commissioner Moyane ("FIC Report") identifying suspicious and unusual transactions, and requesting investigations to be held.	Hogan Lovells Report, page 3, paragraph 4.1
2.	July 2016	SARS invites Makwakwa and Elskie to submit written responses to the allegations contained in the FIC Report by 1 August 2016. Both Makwakwa and Elskie asked for and were granted an extension until 30 September 2016	Hogan Lovells Letter of Engagement, paragraph 8
3.	15 September 2016	Makwakwa suspended by SARS	Modise Statement dated 5 December 2017 to Standing Committee on Finance, paragraph 9; Motau SC Outcome, paragraph 2.1
4.	15 September 2016	Hogan Lovells instructed by SARS	Modise Statement dated 5 December 2017 to Standing Committee on Finance, paragraph 9
5.	4 October 2016	Hogan Lovells Letter of Engagement signed by Commissioner Moyane	Hogan Lovells Letter of Engagement, page 7; Hogan Lovells Report, Page 3, paragraph 8
6.	20 January 2017	SARS serves Makwakwa with disciplinary charge sheet	Motau SC Outcome, paragraph 2.6
7.	28 February 2017	Makwakwa refers dispute to CCMA claiming that his continued suspension is an unfair labour practice	
8.	9 March 2017	PwC delivers its report on the source of the funds of the transactions identified in the FIC Report (the "PwC Source of Funds Report") – findings are inconclusive	Hogan Lovells Report, page 19 (the PwC Source of Funds Report is annexure A thereto)
9.	17 March 2017	Hogan Lovells issues to SARS its preliminary report (on which further documents were awaited)	

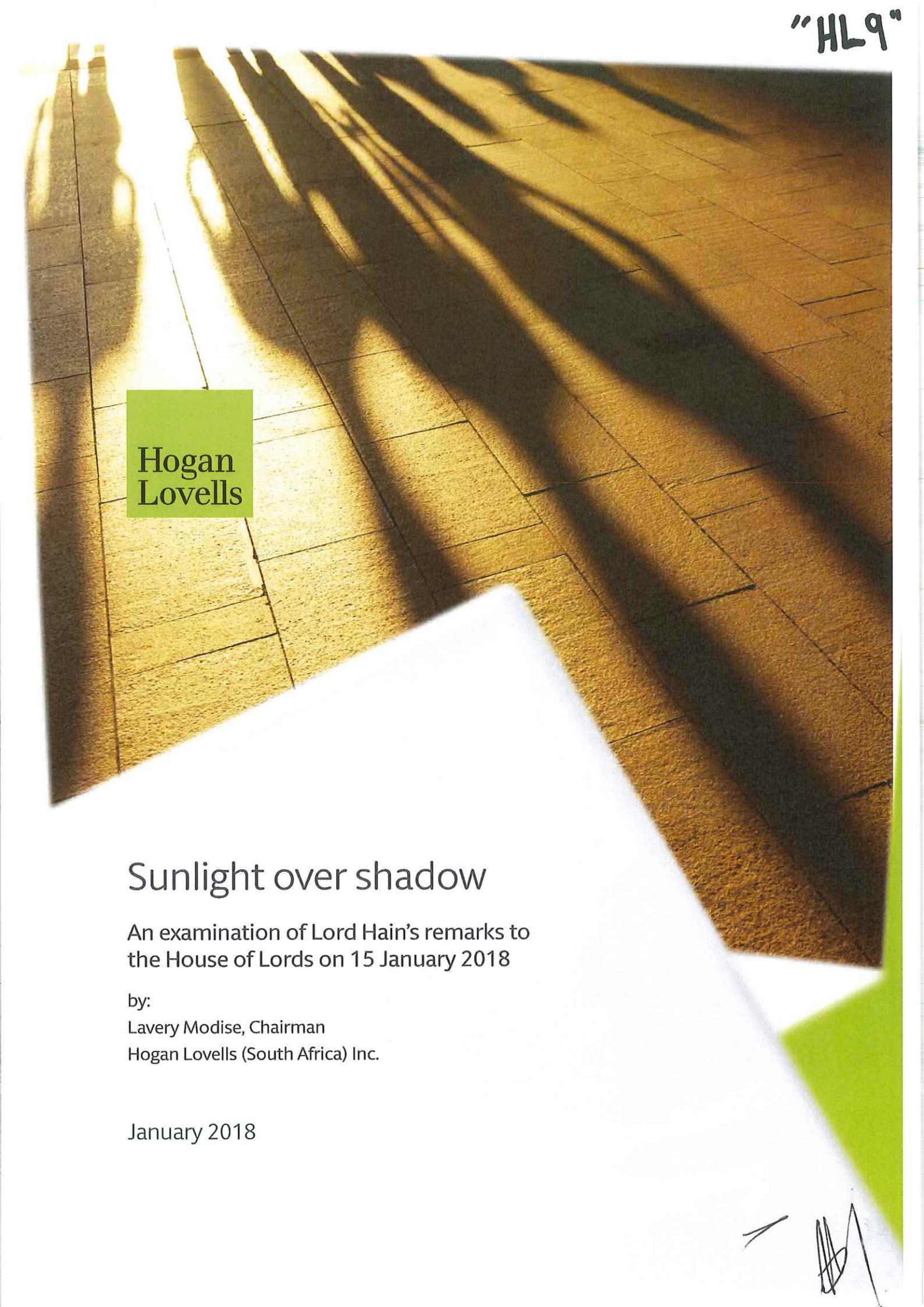
Item	Date	Event	Reference
10.	16 May 2017	Hogan Lovells delivers to SARS its final investigation report (the " <b>Hogan Lovells Report</b> ") (including document awaited under the preliminary report)	Hogan Lovells Report, page 17
11.	12 June 2017	SARS serves Makwakwa with further disciplinary charges (consolidated charge sheet)	Motau SC Outcome, paragraph 2.6
12.	29 June 2017	CCMA hearing on Makwakwa suspension postponed	
14.	27, 28 July 2017	Disciplinary Inquiry before Motau SC	Motau SC Outcome, paragraph 1.3
15.	15 August 2017	Continuation of Disciplinary Inquiry before Motau SC	Motau SC Outcome, paragraph 1.3
16.	13 October 2017	Motau SC delivers his decisions on the Disciplinary Inquiry (the " <b>Motau SC Outcome</b> ")	Motau SC Outcome, page 60
17.	17 October 2017	CCMA application on suspension withdrawn as it became moot	
18.	27 October 2017	Makwakwa reinstated by SARS	SARS Media Statement
19.	3 November 2017	Hogan Lovells issues media statement correcting the impression created by the SARS media statement	Hogan Lovells Media Statement (Hogan Lovells website)
20.	27 November 2017	SARS issues further media statement	SARS Media Statement
21.	5 December 2017	Lavery Modise attends Standing Committee hearing and makes statement; and again corrects the impression made by SARS in its media statements	Modise Statement (Hogan Lovells website)
22.	15 January 2018	Lord Peter Hain makes speech in British House of Lords accusing Hogan Lovells of issuing a "whitewash" of a report	Lord Hain published statement
23.	22 January 2018	Hogan Lovells publishes a media statement as to why Lord Hain's statement of a whitewash was incorrect	Hogan Lovells Statement (Hogan Lovells website)
24.	January 2018	Hogan Lovells publishes Sunlight over Shadow, a detailed examination of and response to Lord Hain's	Hogan Lovells Sunlight over Shadow document



Item	Date	Event	Reference
		remarks to the House of Lords	



"HL9"



Hogan  
Lovells

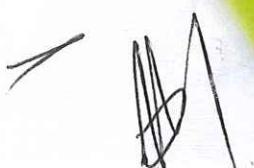
## Sunlight over shadow

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 into 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.



A close-up, slightly blurred photograph of a yellow corn cob with bright sunlight reflecting off the kernels. The background is a soft, out-of-focus yellow and white, suggesting sunlight and a field.

# 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?

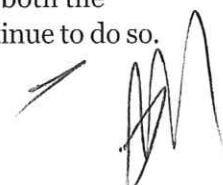
**Facts:** No.

**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.

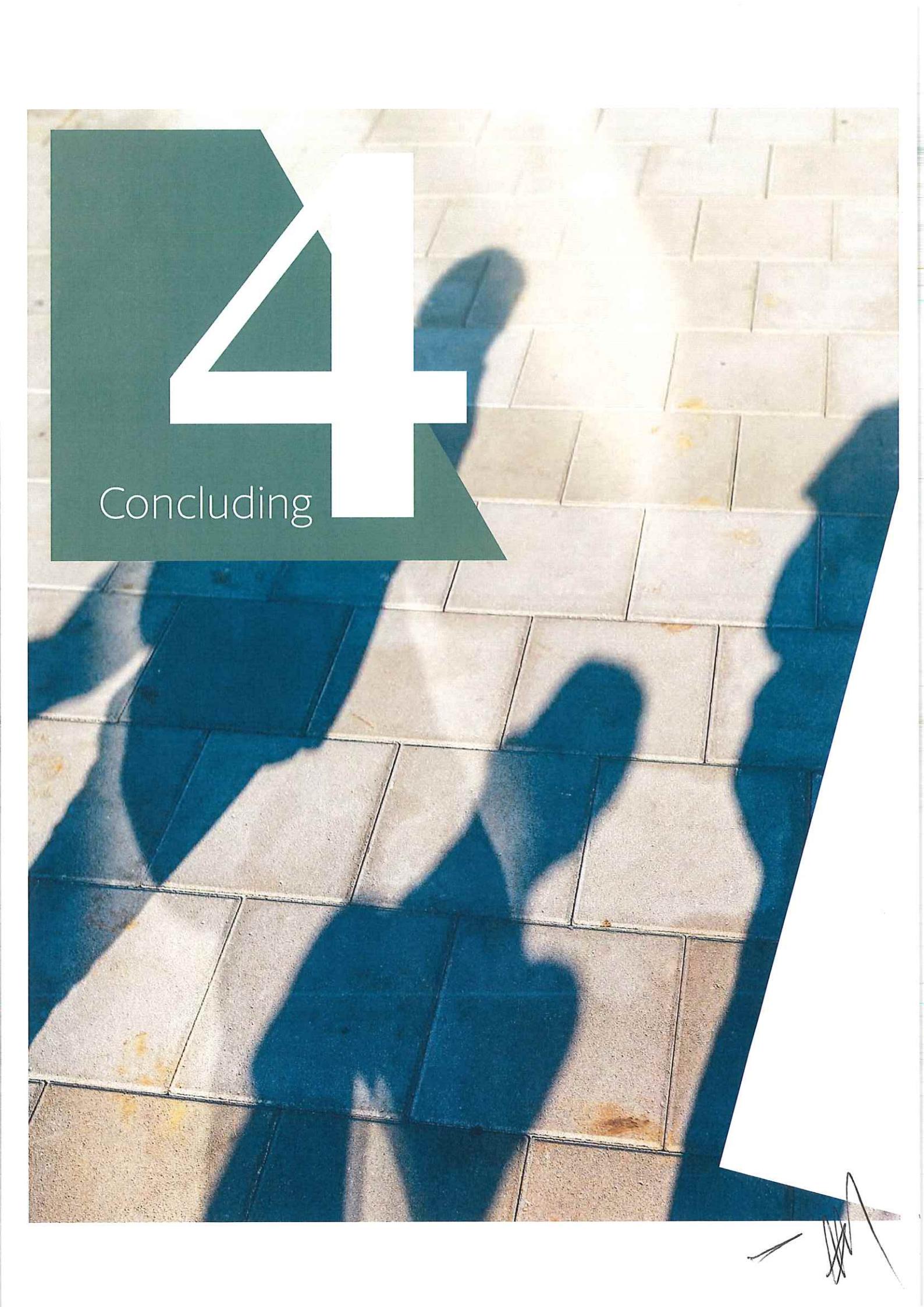
**Comment:** The investigation into the nature of the "suspicious transactions" was already in the hands of the Hawks by the time we were instructed by SARS. We are not aware of the current status of their investigation of Jonas Makwakwa.

“

... 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."

”





# 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

A handwritten signature in black ink, appearing to read "Lavery Modise".

# 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



For more information about Hogan Lovells, the partners and  
their qualifications, see [www.hoganlovells.com](http://www.hoganlovells.com).  
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