

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.

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