

INTERIM REPORT

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

MR PRESIDENT

Herewith the first Interim Report of the Commission of Inquiry.

Judge R Nugent

Commissioner

Date: 27 September 2018

EXECUTIVE SUMMARY

[1] The Commission has made considerable progress towards addressing its terms of reference and is confident that it will be capable of reporting substantively in the assigned time. However, the Commission has been perturbed by evidence it has heard of the current position at SARS, which is set to perpetuate ongoing loss of revenue if there is no immediate intervention.

[2] What is clear to the Commission is that SARS reeks of intrigue, fear, distrust and suspicion. We have heard of it repeatedly in evidence, and we have encountered it ourselves. The trajectory of modernisation, that had been in the making for a decade, was summarily stopped when the current Commissioner, Mr Tom Moyane took office on 27 September 2014, and the systems are degenerating as technology advances. The operating model has been restructured such that fragmentation of functions inhibits coordinated action to the benefit of delinquent taxpayers. The Large Business Centre as it had existed has been eviscerated to the detriment of revenue collection. The restructuring of the organisation displaced some 200 managerial employees from their jobs, many of whom ended up in positions that had no content or even job description, and in exasperation many skilled professionals have left. Others remain in supernumerary posts with their skills going to waste. Measures to counter criminality have been compromised and those who trade illicitly in commodities like tobacco operate with little constraint. Relations between the Commissioner of SARS and other state institutions – the Treasury, the Auditor-General, the Davis Tax Committee, the Financial Intelligence Centre – are icy, if there is any relationship at all, and SARS is isolated from its former high status amongst international bodies. Meanwhile, the reputation of SARS continues to be tarnished by reports in the media, many of which are true, to which the only response by Mr Moyane has been to attempt to intimidate the media by spurious litigation.

[3] In the unanimous view of the Commissioner and those appointed to assist him, that has been brought about by at least reckless mismanagement of SARS under the tenure of Mr Moyane and it ought not to be permitted to continue. We consider it imperative that a new

Commissioner be appointed without delay to remove the uncertainty at SARS and enable it to be set on a firm course of recovery so as to arrest ongoing loss of revenue.

[4] We stress that the replacement of Mr Moyane is not a panacea, but only the first necessary measure without which there is no possibility of rectifying the damage that has been done to SARS, and any further recommendations will be fruitless, hence our recommendation at this stage, without awaiting the Commission's final report. There are other interventions that the Commission anticipates will be required if SARS is to be restored but those are more appropriately dealt with in its final report. We are aware that disciplinary proceedings are pending against Mr Moyane but we consider that to be irrelevant to our recommendation. Our concern is not disciplinary transgressions but instead the management of SARS.

[5] In the circumstances the Commission recommends:

- (a) That the President take steps without delay to remove the current Commissioner of SARS from office.
- (a) That the President thereupon takes steps without delay to appoint a new Commissioner of SARS.

To inspire confidence in a new Commissioner of SARS the Commission further recommends that he or she be appointed through an open and transparent process that is subject to critical appraisal, but without compromising the urgency of the appointment.

INTERIM REPORT

INTRODUCTION

[1] The Commission of Inquiry into Tax Administration and Governance by the South African Revenue Service (SARS) was constituted on 24 May 2018 under Proclamation 17 of 2018, with Terms of Reference contained in the Schedule to the Proclamation. I was appointed Commissioner, and Mr Michael Katz, Mr Vuyo Kahla and Adv Mabongi Masilo were appointed to assist the Commission.

[2] The Commission is indebted to the acting Commissioner of SARS, Mr Mark Kingon, for affording resources to the Commission that enabled it to commence its inquiries without undue delay, and for the positive, and always responsive, contribution he has made to assisting the Commission. Premises leased by SARS, but separate from its own operational premises, were made available at 2nd Floor Brooklyn Bridge, 570 Fehrsen Street, Pretoria. The Acting Commissioner made available to the Commission two senior legal officials to liaise between the Commission and SARS, a staff member to assist in its administration, and a staff member with knowledge of its information technology systems. Other personnel have assisted the

Commission from time to time. A website and dedicated e-mail address were established to facilitate communication, at www.inqcomm.co.za and commission@inqcomm.co.za respectively. Ms Nonhlanhla Mkhwebane was seconded by the Department of Justice and Constitutional Development to act as Secretary to the Commission. The Commission appointed as its counsel, to present and examine evidence, Adv Carol Steinberg, Adv Lunga Siyo and Adv Frances Hobden. I am indebted to them all for the dedicated assistance they have provided, at times under considerable pressure.

OVERVIEW OF THE COMMISSION'S WORK

[3] SARS is a large and complex institution. The initial work of the Commission entailed familiarising itself with the history, structure and operation of SARS, identifying and interviewing employees and former employees who were expected to have information relevant to the inquiry, identifying and scrutinising relevant documents, inviting submissions from employees and the public at large, and consulting with the institutions referred to in the Terms of Reference. The Commission's inquiries have been directed primarily at operations at the Head Office of SARS, but limited interviews were also held at its branch offices in Cape Town and Durban.

[4] Submissions and information were invited from the public and from employees of SARS, in confidence if need be. Submissions were invited direct from Business Unity South Africa, Black Management Forum, SA Institute of Chartered Accountants, Confederation of SA Trade Unions, SA

Federation of Trade Unions, Black Business Council and the SA Institute of Tax Practitioners. Written and oral submissions were received from the SA Institute of Chartered Accountants, the SA Institute of Tax Practitioners, and the SA Association of Freight Forwarders, and further oral submissions were presented by the SA Professional Accountants Association, and the Fair Trade Independent Tobacco Association.

[5] The regulations governing the conduct of the inquiry allow the Commission to receive evidence in the form of oral evidence, affidavits, and documents alone. While the Commission has endeavoured to receive evidence that is open to public scrutiny, it has been restricted in that regard in two respects.

[6] The Tax Administration Act 28 of 2011 restricts the disclosure of 'taxpayer information' and 'SARS confidential information'. Taxpayer information is generally to be held in secret, but may be disclosed by a senior official of SARS to various bodies, including a Commission of Inquiry. The Commission considers it prudent at this stage to disclose such information to the President only so far as it is necessary to fulfil its mandate while withholding the identity of the taxpayers concerned but will consider the position further when submitting its final report. 'SARS confidential information' may be disclosed on the authority of the Commissioner of SARS. The acting Commissioner has authorised the disclosure of all information that has been requested by the Commission but prudence has been exercised in disclosing it further.

[7] The second restriction with which the Commission has been confronted is disturbing and points to a deep malaise within SARS that we consider requires immediate intervention, which I come to presently.

[8] A significant number of employees of SARS who were identified as possibly having information relevant to the inquiry were fearful of disclosing information, other than under conditions of confidentiality, and in some cases were fearful even of being seen at the premises of the Commission, for fear of reprisals if the current Commissioner of SARS, who is now under suspension, were again to assume his position, or from senior management of SARS even if that were not to be the case. While some such employees have been willing to present evidence openly, notwithstanding anxiety on their part, others have refused point blank to do so. Numerous written submissions, letters and affidavits from employees have also been received either anonymously or under conditions of confidentiality for the same reason. While the Commission has powers of compulsion they have not been exercised in such cases, both because evidence given reluctantly is unlikely to be full and frank, and also out of consideration for the persons concerned.

[9] Those restrictions have limited the scope for opening to public scrutiny some submissions and evidence received by the Commission. We consider the fears expressed by employees to be well-founded, and consider that the inquiry will be considerably compromised if the Commission is deprived of material information only because those in possession of the information are fearful of disclosing it. In those circumstances the Commission will be taking account when making its final

report of material furnished in confidence or anonymously, but will be relying upon information received in that way only with circumspection and corroboration or other means of verifying the information. For purposes of this report, however, the Commission has relied only on evidence that has been given in public, or is in the public domain, and to the extent indicated below, our own observations.

[10] The Commission has thus far not compelled any person to appear and to be examined by the Commission, as it is entitled to do under the Commissions Act and the Regulations governing the Inquiry. There is often a misconception about utilising those powers in order to gather evidence. I have observed that evidence given under compulsion is seldom full and frank, and that applies particularly where a witness has reason to dissimulate or mislead, and the gathering of information in that way is usually tedious, and largely ineffective when pursued in a vacuum. The Commission has considered it prudent and more efficient initially to gather evidence from willing sources and from documentary sources. It will later consider whether and to what extent that evidence is required to be supplemented by evidence given under compulsion. It is premature to consider whether such circumstances might yet arise.

[11] That having been said, there has been a noticeable shift in the attitude of employees over the past number of weeks, with many more coming forward more willingly, and even enthusiastically at times, to offer evidence. We attribute that to a number of factors. Partly it is an increasing anger amongst employees at the damage they perceive to have been done to SARS and themselves. Partly it is an increasing appreciation that someone is listening to what they have to say. Partly it is an increasing

awareness that if they want things to change they must take the risk of speaking out. And partly it is an increasing confidence that the work of the Commission might indeed bring about change. We respectfully request the President to bear this in mind when considering the Commission's recommendations.

[12] Public hearings of oral evidence were held from 26 - 29 June 2018, from 21 - 24 and again from 28 - 31 August 2018, and further public hearings are currently being held. In the course of those hearings the oral evidence of 60 witnesses will have been heard.

THE RESPONSE OF SARS LEADERSHIP TO THE COMMISSION

[13] SARS is an institution that is vital for the welfare of the country. It is also a complex organisation. And it is one that is particularly vulnerable to corruption, bearing in mind that over R1 trillion passes through its hands each year. Following upon recommendations of the Katz Commission directed at attracting personnel of the highest calibre, its senior leadership is paid remuneration substantially exceeding that paid to senior employees in public service.

[14] With high office and high remuneration in public affairs goes high responsibility. It cannot be said too strongly that SARS deserves, and demands, leadership of the highest integrity and character, with exceptional managerial experience and skill, and, as important, deeply conscious of its duty to account for the welfare of the organisation.

[15] When conditions at such an institution reach such an ebb that it becomes a matter of serious public concern, warranting the establishment of a Commission of Inquiry, it is to be expected that its leadership will be conscious of that public concern, and will be anxious to engage with the Commission to right what is wrong. We have encountered quite the opposite in this case.

[16] From inception the current Commissioner of SARS, Mr Tom Moyane, has remained in the shadows, emerging to attend the Commission's public hearings for a few hours on one occasion only, and then only to disparage and attempt to derail the Commission. What occurred on that occasion is related in the reasons given by the Commission for dismissing an application by Mr Moyane for certain rulings to be made, which are available on the Commission's website.

[17] Since then his attorney has been specifically notified each time public hearings have been held but neither he nor any representative on his behalf has been present. His attorney has been pertinently asked on two occasions whether Mr Moyane wishes to respond to evidence that has been given in public, much of which has been damning of his management, in which case he was invited to meet with counsel for the Commission. On the first occasion the response to the Commission was that Mr Moyane was considering his position and was not able to respond 'one way or the other'. On the second occasion the Commission received not even the courtesy of a response. Copies of that correspondence are contained in the annexure to this report, marked 1 to 5.

[18] On 7 September 2018 Mr Moyane was also advised that the Commission was considering making various findings and recommendations in this interim report, and he was invited to make written submissions as to why it should not do so by 21 September 2018. A copy of the Commission's letter to that effect is marked 6 in the annexure. The response, two weeks later, on the afternoon of 21 September 2018, is 7 in the annexures, from which it appears, once again, that Mr Moyane has no intention of making submissions, but is intent instead on derailing the Commission. The Commission's response to that letter is marked 8.

[19] It is perfectly clear that Mr Moyane has no intention of engaging with the Commission or confronting the evidence that has been presented and has no intention of accounting for his tenure as Commissioner of SARS. That is not the character of a person fit to lead a vital public institution.

[20] From the evidence we have heard in public thus far, and our own observations in the course of the inquiry, it is clear that the present state of SARS is disturbing, to the ongoing detriment of revenue collection and the erosion of tax compliance, and that urgent intervention is required if the ongoing loss is to be arrested.

[21] The acting Commissioner, Mr Mark Kingon, has taken admirable steps to correct the more immediate concerns, but SARS can best be served only by long-term certainty and stability, which is not the current position.

It is intolerable that the proper functioning of such a vital public institution should be held hostage by the personal interests and ambitions of one man.

[22] We also have some concerns regarding the senior management of SARS, who have seemingly sat back while the reputation of SARS has been tarnished and its personnel demoralised. Early in this inquiry I attended a meeting of the SARS Executive Committee (EXCO) comprising its Chief Officers who report to the Commissioner. I explained the purpose of the Commission and urged them to engage with the Commission in identifying, and recommending correction where necessary, to the current governance of SARS. It is only in recent weeks that some have come forward, but then only to respond to evidence that has reflected adversely upon them personally. We await, however, what we have been told is a 'joint submission', that is apparently being prepared by members of EXCO, but find it troubling that they should feel it necessary to await the evidence given at public hearings before placing their submissions before the Commission.

THE TERMS OF REFERENCE

[23] The terms of reference of the Commission are extensive and were always ambitious. With the knowledge we now have of the complexities of SARS, and the challenges of extracting information relevant to some of those terms, the task of reporting comprehensively on them all in the time assigned to the Commission is formidable. I am confident, however, that

the Commission will be capable of substantively fulfilling its mandate in the allotted time.

[24] What has become clear already is that many of the issues raised in the terms of reference are mere symptoms of a greater affliction at SARS, that has led the institution to its present condition, with ongoing compromise of revenue collection,

THE CURRENT STATE OF SARS

[25] The day Mr Moyane took office was a calamity for SARS. Almost immediately, and then continuously for the next eighteen months, SARS was thrown into turmoil, with tragic consequences for the lives of many people, tragic consequences for the reputation of SARS, and tragic consequences for the country at large.

[26] At the commencement of the period to which this Inquiry relates, SARS was on a trajectory that had earned it accolades domestically and abroad. It was operating under a model formulated early in its existence, directed at reversing non-compliance with tax laws, inherited partly from its history. That model was founded on three legs – education, service and enforcement – and the organisation was structured to meet those objectives.

[27] One initiative to that end was the introduction of information technology – a programme referred to as modernisation – to replace the

paper-based operations of SARS, thereby accelerating the processing of tax collection, freeing human resources for more productive tasks, and enabling SARS to accumulate data for analysis and understanding of taxpayer behaviour and the tax gap. Another was the creation of the Large Business Centre, designed to provide 'one stop' service to large corporate taxpayers, from which about 30% of revenue is collected. SARS also had effective measures in place to counter the illicit trades that are capable of depriving the State of billions.

[28] But in any organisation the morale of the workforce is key and in that respect SARS also excelled. Employees were inspired by a conviction, instilled in them by former Commissioners, that they were working for the 'higher purpose' of creating a better South Africa. The 'higher purpose' to which they were inspired is a phrase we have heard time and again from those who were then employed by SARS. From the evidence the Commission has heard, which has not been contested, notwithstanding repeated calls in public for anyone who contest the evidence to come forward, that the environment at SARS was dynamic and exhilarating, as employees worked with dedication for long hours, in pursuit of that 'higher purpose'. Employees were proud to work for SARS and skilled professionals were keen to join the organisation so as to share in that enthusiasm and pride.

[29] No doubt that was not universally the case. We have heard from some, though only in written submissions, most often submitted anonymously, that management was dictatorial. Some have said that transformation was neglected. We have heard that power within the

organisation was excessively concentrated. Clearly there were also shortcomings in the operations. While there is undoubtedly some truth in that, the overwhelming thread that runs through the accounts presented to us, is the vibrant and dedicated environment I have described.

[30] That is not the SARS of today. Today the air at SARS reeks of intrigue, fear, distrust and suspicion. We have heard of it in evidence, and we have encountered it ourselves. One witness recounted how, early in his tenure, Mr Moyane had a plethora of CCTV cameras installed, such that employees feel themselves under constant surveillance, so much so that some employees have taken to covering the camera lenses on their computers with tape, lest they be watched while they go about their work, fearful of any perceived misdemeanour that might result in disciplinary proceedings. The trajectory of modernisation, that had been in the making for a decade, was summarily stopped when Mr Moyane arrived, and now only adjustments and adaptations are made to the systems from time to time, while the systems themselves degenerate as technology advances. The operating model has been restructured such that fragmentation of functions inhibits co-ordinated action over various disciplines to the benefit of delinquent taxpayers. The Large Business Centre as it had existed has been eviscerated to the detriment of revenue collection. The restructuring of the organisation displaced some 200 managerial employees from their jobs, many of whom ended up in positions that had no content or even job description, and in exasperation many skilled professionals have left. Others remain in supernumerary posts with their skills going to waste. Measures to counter criminality have been rendered ineffective and those who trade illicitly in commodities like tobacco operate with little constraint. Relations between the Commissioner of SARS and

other state institutions – the Treasury, the Auditor-General, the Davis Tax Committee, the Financial Intelligence Centre – are icy, if there is any relationship at all, and SARS is isolated from its former high status amongst international bodies. Meanwhile, the reputation of SARS continues to be tarnished by reports in the media, many of which are true, to which the only response by Mr Moyane has been to attempt to intimidate the media by spurious litigation.

[31] There is no doubt that all this has compromised revenue collection and tax compliance and that is set to continue if things go on as they are. We do not think it will be possible to attribute the decline in revenue collection with any accuracy, but the analysts we have heard all agree that a material part is to be laid at the door of ineffectiveness at SARS, and the ongoing loss is set to continue in the absence of decisive intervention.

[32] It is premature to report exhaustively on how and why this transition occurred but it is clear that the tumultuous events I now summarise have all contributed to the present state of SARS.

The Change in Senior Management

[33] The senior management of SARS comprises the Commissioner and its Chief Officers who report to the Commissioner. Together they constitute an Executive Committee (EXCO) that has evolved by policy and practice as the body through which SARS is managed.

[34] Immediately before Mr Moyane took office EXCO comprised Mr Ivan Pillay, who was acting Commissioner, Mr Barry Hore (Chief Officer: Operations), Mr Kosie Louw (Chief Officer: Legal and Policy), Mr Gene Ravele (Chief Officer: Tax and Customs Enforcement Investigations), Ms Elizabeth Kumalo (Chief Officer: Human Relations), Mr Bob Head (acting Chief Officer: Finance), Mr Peter Richer (acting Chief Officer: Strategy, Enablement and Communications) and Ms Sanita Manik (Group Executive: Large Business Centre. The Group Executive for Internal Audit and the Company Secretary, attended EXCO meetings as invitees.

[35] An account of what brought SARS to its present condition must start with the extraordinary consequences of reports in the Sunday Times that an unlawful 'rogue unit' existed within SARS. The unit concerned was a unit that had come into existence in about 2008 under the name 'Special Operations', to investigate the illicit trades in tobacco, liquor, counterfeit goods, and so on. It later changed its name to the 'National Research Group' and again metamorphosed into the 'High Risk Intelligence Unit', which comprised six members.

[36] I have not yet found why the creation and existence of the unit was said to have been unlawful, which is how it was consistently and uncritically depicted. I find no reason why the establishment and existence of the unit was indeed unlawful, and I am supported in that by an opinion given to Mr Moyane by leading senior counsel in late 2015. As far as I am aware that opinion has never been publicly disclosed. It might be that some of the activities of one or more of its six members was unlawful but

that is something else. If that was indeed the case, it is nonetheless incredible that unlawful acts of one or more of six men led to millions of rands being spent, and the holding of repeated inquiries, with continuing damage to the reputation of SARS.

[37] What sparked this off was a report in the Sunday Times on 12 October 2014, some two weeks after Mr Moyane took office on 27 September 2014. It was reported that an unlawful 'rogue unit' existed within SARS, whose members had planted listening devices in the home of former President Zuma. That report, and others that followed in similar vein, was to do immeasurable damage to SARS, and to the lives of many people.

[38] Mr Adrian Lackay, who was then the spokesperson for SARS, had got wind of the allegations shortly before the report was published, through questions that were being posed to him by journalists, and he urged Mr Moyane to take steps to deal with the allegations, but Mr Moyane ignored him, contending that the allegations would come to nought, in stark contrast to his conduct when the allegations were published.

[39] Once having read the report in the Sunday Times on 12 October 2014 Mr Moyane called together the members of EXCO that afternoon and demanded to know what they knew about the allegations, and all the members disavowed any knowledge. On Monday the members of EXCO were summoned once again, on this occasion with their subordinates, and were asked once again what they knew, and the members of EXCO once

again disavowed any knowledge, whereupon Mr Moyane promptly announced he had no confidence in the members of EXCO and that it was disbanded.

[40] That response is extraordinary in any rational terms. Mr Moyane had barely arrived at SARS, with no experience of revenue collection, yet almost immediately he denounced and humiliated senior management, with vast knowledge and experience, and dissolved the body through which SARS was being managed. All that on the basis of no more than a newspaper report, and moreover, a report on events of which at least most of the Chief Officers could not be expected to have had any knowledge.

[41] On 5 December 2014 Mr Pillay and Mr Richer were suspended, on the basis of findings made by a panel that had inquired into the allegations. The Labour Court ordered withdrawal of the suspensions, but Mr Pillay and Mr Richer were suspended again in January 2015. Disciplinary proceedings were then commenced against them and in May 2015 they resigned. Mr Ravele also resigned in May 2015 following accusations by Mr Moyane that he had engaged in corrupt activity some years earlier.

[42] I do not at this time report more fully on those events because they remain under inquiry. What is relevant for present purposes is not whether they were justified or not, but only that they occurred, throwing the credibility of senior management into uncertainty and turmoil.

[43] Meanwhile, in October 2014, Mr Moyane ordered the disbandment of the High Risk Investigation Unit, and the termination of surveillance of

those who were under investigation by the unit. No new capacity was created to continue its functions. It can be inferred from analytical evidence we have heard that there is at present a material and ongoing loss of revenue from tobacco related taxes for want of investigation and vastly diminished regulation of the illicit economy.

[44] December 2014 was a busy month for Mr Moyane. Following on a decision to do so in October 2014, a consulting firm called KPMG was appointed by Mr Moyane to investigate the 'rogue unit' allegations, particularly so far as they might implicate Mr Pillay, Mr Richer and two others, at an ultimate cost to the taxpayer of about R24 million (the money has since been returned to SARS). Computers were seized and a mountain of correspondence and other documents were trawled through until a preliminary report was prepared in about June 2015 making damning allegations against Mr Pillay in particular, consequent upon which criminal proceedings were initiated against him and others by Mr Moyane. That was to be followed by criminal charges being brought against Mr Pillay, Mr Magashula and Mr Gordhan, in circumstances still unclear to me, which were later withdrawn.

[45] Also in December 2014 a consultancy called Bain & Co was appointed to review the operating model at SARS under the guidance of a steering committee headed by Mr Makwakwa.

[46] It has now emerged from an affidavit deposed to by the local managing partner of Bain that it had been advising Mr Moyane for a

considerable time before he was appointed, producing for him a number of reports on transforming and taking charge of SARS. Why that occurred remains under inquiry and will be reported upon in the Commission's final report. Serious questions have also arisen concerning the propriety of the award of that contract, which also remains under inquiry. For the present it is sufficient to say that the arrival of Bain brought its own turmoil.

[47] Following upon a short and perfunctory 'diagnostic' investigation by Bain & Co, with little or no consultation with operational managers, nor communication to employees of what was going on, a new operating model for SARS was devised and implemented. I return to the consequences of that presently.

[48] Meanwhile, sometime in early 2015 EXCO was re-constituted. By then it had been denuded of its core management experience and skills. Mr Pillay and Mr Richer had been suspended. Mr Hore had resigned. The contract of Mr Head had come to an end. Ms Kumalo remained for a while but she was soon to retire. Mr Matsobane Matlwa had been appointed Chief Officer: Finance, on 17 December 2014, and Mr Jonas Makwakwa, who until then had been Group Executive: Audit (a management level immediately below the Chief Officers) had been appointed Acting Chief Officer: Operations to replace Mr Hore. Other positions were being filled by acting appointments for a large part of 2015.

[49] By the middle of 2017 nothing was left of the EXCO that had existed when Mr Moyane took office. Mr Makwakwa was Chief Officer: Business

and Individual Tax. Mr Matsobane Matlwa was Chief Officer: Finance. Mr Teboho Mokoena was Chief Officer: Human Capital and Development. Mr Jed Michaletos was Chief Officer: Customs and Excise. Mr Hlengani Mathebula was Chief Officer: Governance, International Relations, Strategy and Communications. Ms Refiloe Mokoena was Chief Officer: Legal Counsel. Ms Mmamathe Makhekhe-Mokhuane was Chief Officer: Digital Information Service & Technology. Ms Mogola Makola was Chief Officer: Enforcement.

[50] All the appointees, other than Mr Makwakwa, and Mr Matlwa, who was appointed in December 2014 but had worked for SARS before, emanated from outside SARS, and none but them had had experience of tax collection. The institutional memory that had been built up in SARS was almost entirely eradicated in EXCO.

[51] For completeness, Mr Matlwa, Mr Michaletos and Mr Makwakwa have since resigned, and Ms Mokoena is at present on suspension.

Replacement of the Operating Model

[52] It was amidst the disruption and uncertainty in senior management for most of 2015, and fuelling of the ongoing 'rogue unit' controversy, that Bain & Co devised a new operating model at SARS. Not satisfied with four potential models proposed by Bain & Co, Mr Moyane insisted on changes of his own. The new operational model was presented to staff as a fait accompli, and was then implemented from 2015 through to early 2016.

[53] The effect of the new operating model was to throw operational managers into uncertainty for their jobs. Some 200 employees found themselves without a job, and were required to apply for posts in the new organisational structure. Some were placed in new posts and others were relegated to supernumerary posts that had no job content nor even job description. Ostensibly, that was done to avoid retrenchments, but I do not accept that SARS was so rich in human resources that it had no productive place for employees of skill and long experience. I think it is plain that placing employees in those positions was calculated to drive them out of SARS, and that is what occurred in many cases. Others with skill and experience remain at SARS with little to do.

[54] In modern times a tax administration's effectiveness rests solidly on first-rate information technology. I have observed that immediately upon his arrival Mr Moyane suspended the modernisation programme. During 2015 a consulting firm called Gartner was brought in to review the SARS information technology. We have yet to inquire into the nature and effect of the work they did. Suffice to say that a written submission recently received from the current Chief Officer of that division records that the systems are in a state of disarray and degeneration.

[55] No responsible leader of a major and complex organisation would have acted as Mr Moyane did, with lasting impact on the current state of SARS. With no experience of SARS or of revenue collection, his first decisive step was to denounce and humiliate its senior management and deprive it of its role. Having done so he turned a world-class organisation

upside down, leaving SARS as it is today: wracked with intrigue, suspicion, and distrust, and fear of senior management; information technology that is in decay; a fragmented structure that inhibits collaboration amongst functions to the detriment of revenue collection; space for the illicit trade to flourish; loss of long-serving skills; skilled and experienced personnel in supernumerary positions doing little if anything at all; and revenue collection compromised.

[56] The following extract from the evidence of a highly skilled employee who was recently bullied out of SARS, amply encapsulates what we have found at SARS:

'I think what has happened to SARS should never be allowed to happen again. I think a lot of people have suffered. It's left the organisation, and I'm using the words of people that I still speak to that are still within the organisation today, it's left them broken, It's broken people and it's broken the organisation and people need healing, that's the word I've been told. That people need to heal from this. People who were technicians, who were just interested in working for the higher purpose, and delivering and just enjoying their jobs and I was one of those people, we got caught up in a political narrative that we shouldn't have been part of in the first place. And I think it's a lesson for us that we should never be here again because the only people who have suffered is the country, the people of South Africa.'

THE RELATIONSHIP WITH OTHER INSTITUTIONS

[57] The effective functioning of the State calls for close collaboration between SARS and other State institutions. It is to be expected that the Commissioner of SARS will liaise closely with the Minister of Finance, but

while Mr Gordhan held that position there was active defiance. When Mr Gordhan became concerned at the steps being taken to change the operating model he asked for it to be suspended, but that was ignored. When he disapproved the extent of bonuses to be paid, Mr Moyane again defied him, bringing him into conflict with the Auditor General. According to Treasury officials, the relationship between Treasury and Mr Moyane has all but broken down.

[58] The Davis Tax Committee has been ignored and its chairman disparaged. Such a low ebb has the relationship reached that the Committee is not able even to obtain information from SARS. The response of Mr Moyane to the former Director of the Financial Intelligence Centre, when alerted to apparent financial irregularities of Mr Makwakwa, was disrespectful and hostile. Mr Moyane went to war against the Auditor-General through litigation in the courts that, so far as I am aware, is unprecedented in law.

[59] In the public mind Mr Moyane continues to allow SARS to be brought into disrepute. Reports in the media on matters of serious concern, many of which we have found to be true, are not responded to by addressing them, but instead by attempting to muzzle and intimidate the media through costly litigation on spurious grounds.

[60] It is premature to say why all this has occurred, but this much is clear: SARS has been brought to its present state through what is at least

reckless mismanagement by Mr Moyane, and it is imperative that SARS be restored to a decisive course of recovery under sound management.

FUTURE GOVERNANCE OF SARS

[61] What has occurred at SARS during the tenure of Mr Moyane demonstrates that material legislative changes need to be made to enhance the formal governance of SARS so as to avoid it recurring. Having heard evidence on that issue we set out briefly our preliminary views, which will be expanded upon and formulated in the Commission's final report.

[62] Proper governance of SARS is an essential pillar for its efficient and effective functioning. Its impact is felt in the overall performance of SARS, most importantly, in revenue collection. It also impacts on the budgetary process of SARS as an institution and indeed of the nation, and on taxpayer morality.

[63] Enhancement of governance would need to be directed at a number of structural and operational issues including :-

- the optimum model for SARS including the responsibilities of its head (i.e. the Commissioner) and reporting obligations;
- the appointment and removal of the Commissioner;
- detect and prevent internal fraud, as well as internal and audit functions;

- oversight by an independent body that oversees their results and a budgetary review process that monitors their spending;

[64] On 12 October 2017 the Davis Tax Committee presented a Report on various aspects of tax administration to the Minister of Finance. As regards the appointment of the Commissioner the Davis Committee recommended that the Commissioner should be appointed in a manner similar to the appointment of the Public Protector, or that the Commissioner should be appointed by the Minister of Finance. In this regard paragraph 39 of the Davis Committee Report on Tax Administration reads as follows:

‘An alternative proposal would be to revert to the position which followed the Katz Commission’s recommendations, namely that the appointment of the Commissioner of Inland Revenue is made by the Minister of Finance. There is adequate justification for this proposal. As noted, the Minister of Finance is constitutionally responsible for the preparation and the presentation of the budget. It is unclear whether the Minister plays any legal role in the accountability of SARS to its mandate, which mandate is critical to the success of any money bill as well as the Budget. It is the Minister who must take responsibility for the performance of government in circumstances where he may be powerless to deal with an obvious problem of tax collection/integrity. A system where the Commissioner operates outside the strictures of the Minister and indeed Cabinet and is only answerable directly to the President is not conducive to a responsive and accountable SARS. This second proposal could be modified to promote a further layer of accountability. The appointment by the Minister of Finance can be made subject to recommendations made by an advisory board. In this connection, the composition of which is described below.’

[65] The Davis Committee also recommended the creation of a Board that would supervise the operation of SARS with the clear objective of

promoting the integrity of its conduct as well as to ensure that it implements systems to collect revenue as fairly and efficiently as possible. In this regard paragraph 40 of the Davis Committee's aforesaid Report reads as follows

'The Committee strongly recommends the creation of a Board which would supervise the operation of SARS with the clear objective of promoting the integrity of its conduct as well as to ensure that it implement systems to collect revenue as fairly and efficiently as possible. The Board should be constituted by the Minister of Finance and, save for the Commissioner, or his/her delegee, the Deputy Commissioner and the Director General of Finance or his/her delegee, it should be comprised of members who are attached neither to Treasury nor SARS and who may be appointed by the Minister with due regard to representivity, expertise in finance and taxation and the general economy. It could be chaired by a retired judge. The Board could be provided with sufficiently strong powers of investigation so that it may be empowered to make meaningful recommendations to the Minister with regard to the question of accountability of SARS and to its compliance with its statutory obligations and own strategic vision and mandate. As recommended, the Board could be mandated to provide the Minister with a shortlist of candidates for the office of Commissioner, from whom the Minister is obliged to choose.'

[66] Chapter 3 of the Constitution clearly sets out the principles of cooperative government, which is critical if the different spheres of government are to succeed. If SARS had continued to apply these principles, the Commission believes that most of the destructive events and reputational damage which took place at SARS between 2014 and March 2018, would not have occurred.

[67] The Act as it stands creates an anomaly in that the appointment of the Commissioner by the President, who is far removed from the day to day operations at SARS, and who is not ultimately responsible for tax policies, preparation and presentation of the budget and ensuring that the Government has sufficient money to spend on its programmes, is not practical. This cannot be achieved without a real level of accountability by the Commissioner of SARS to the Minister of Finance.

[68] We are, in general, in accord with those sentiments. The process for appointment of a Commissioner of SARS warrants revisiting, and we will report on that in due course. Once appointed, there ought to be checks on the exercise of his or her powers, some degree of accountability to the Minister of Finance, and provision for co-operation between SARS and other State Institutions. There ought also to be a mechanism for intervention when things are seen to be going wrong. That ought not to lie within the province of the Tax Ombud, as has been mooted, whose proper province is taxpayer affairs, and not administration within SARS. We will address those principles in our final report.

CONCLUSION AND RECOMMENDATIONS

[69] It is imperative that SARS be urgently restored to sound management to arrest ongoing loss of revenue and eroding tax compliance and to set SARS on a firm course of recovery. The acting Commissioner has taken admirable steps towards correcting the most immediate concerns but long-

term and decisive decision making is feasible only in conditions of certainty and stability. Moreover, daily management at SARS remains in a state of undesirable uncertainty for so long as future management is unclear. A new Commissioner is needed without delay by SARS, which is not possible while Mr Moyane remains in office, and that state of affairs needs now to be brought to an end. That is the unanimous view of the Commission and those who have been appointed to assist the Commission.

[70] The replacement of Mr Moyane will by no means by itself restore SARS but it is a non-negotiable pre-requisite for the process of recovery to begin, which is why we have recommended it at this early time. We have other serious concerns that will be addressed in the Commission's final report but without the replacement of Mr Moyane any expectation of recovery at SARS is futile.

[71] We are aware that Mr Moyane is the subject of disciplinary proceedings that are pending but we consider any disciplinary transgressions there might or might not have been to be of no consequence to our recommendations. Our concern is not disciplinary transgressions but the management of SARS.

[72] For those reasons it is recommended:

- (b) That the President take steps without delay to remove the current Commissioner of SARS from office.

- (c) That the President thereupon takes steps without delay to appoint a new Commissioner of SARS.

To inspire confidence in a new Commissioner of SARS the Commission further recommends that he or she be appointed through an open and transparent process that is subject to critical appraisal, but without compromising the urgency of the appointment.

[73] The Commission will report substantively on the matters that are subject to its terms of reference in its final report.

Commission of Inquiry into Tax Administration and Governance by SARS |

Hilton House, 2nd Floor, 570 Fehrsen Street, Brooklyn, 0181

Contact number: (012) 6479486

E-Mail: commission@inqcomm.co.za

Mabuza Attorneys
Eric Mabuza
eric@mabuzas.co.za
1st Floor
83 Central Street
Houghton
2198

20 June 2018

Dear Mr Mabuza

I understand you are the attorney of the Commissioner of the South African Revenue Service (SARS), Mr T. Moyane.

I write to inform you, for your information and as a courtesy to your client, that the Commission of Inquiry will be hearing evidence in public from 26 to 29 June 2018, commencing at 14:00 on 26 June 2018, at the following venue:

**The Auditorium
Linton House, 2nd Floor
Brooklyn Bridge
570 Fehrsen Street
Brooklyn, Pretoria**

Yours faithfully

(sent electronically)

**Judge R Nugent
Commissioner**



Judge R Nugent
2nd Floor, Hilton House
570 Fehrsen Street
Brooklyn
Pretoria

Email: commission@inqcomm.co.za

1st Floor
83 Central Street
Houghton
2198
PO Box 55045
Northlands 2116
Tel: +27 11 483-2387/483-0476
Fax: +27 11 728 - 0145
Direct e-mail: eric@mabuzas.co.za

Your Ref:
Our Ref: Mr. ET Mabuza
Date: Friday, June 22, 2018

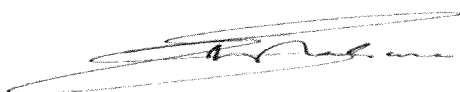
Dear Judge Nugent,

Commission of Inquiry into Tax Administration & Governance by SARS

1. Thank you very much for your letter dated 20 June 2018, in which you advise Commissioner Moyane, as a courtesy, of the impending hearings of your Commission of Inquiry next week.
2. Due, *inter alia*, to the short notice it is not possible to attend the hearings in full. However our client deems it necessary to request an opportunity to address the Commission hearings in order, *inter alia*, to place certain issues on the record and where necessary to seek certain rulings. Such issues include but may not be limited to:
 - 2.1. Raising an objection against the suitability of Prof. Michael Katz to serve as a member of the Commission given his conflicted status as the personal and business legal representative of Mr Cyril Ramaphosa who is:
 - 2.1.1. The President of South Africa;
 - 2.1.2. The person who appointed the Commission; and
 - 2.1.3. The person who is our client's key adversary in pending disciplinary inquiry involving the current Commissioner of SARS.

- 2.2. Seeking an undertaking from the Commission that it will stay clear of dealing with any issue which is the subject matter of the pending disputes which have been placed before the disciplinary inquiry chaired by Adv Azhar Bham SC so as to avoid double jeopardy and manifest unfairness.
- 2.3. Expressing our client's interest in participating in and co-operating with your Commission and attending to the practical arrangements for doing so, in his capacity as the current Commissioner of SARS.
3. We would appreciate it if an arrangement can be reached for our client to make submissions in respect of the above issues preferably on 29 June 2018 at your commencement time.
4. We await your urgent response.

Yours faithfully



MABUZA ATTORNEYS

Hilton House, 2nd Floor, 570 Fehrsen Street, Brooklyn, 0181

Contact number: (012) 6479486

E-Mail: commission@inqcomm.co.za

Mabuza Attorneys
Mr Eric Mabuza
eric@mabuzas.co.za
1st Floor
83 Central Street
Houghton
2198

23 June 2018

Dear Mr Mabuza

I have noted the contents of your letter of Friday, 22 June 2018. Note that the hearings commence on Tuesday 26th and not 29th. You are invited to make any submissions on behalf of your client at 10h30 on Tuesday 26th June at the venue indicated in my earlier letter.

Kind regards

(sent electronically)

Judge R Nugent
Commissioner

Judge R Nugent
2nd Floor, Hilton House
570 Fehrsen Street
Brooklyn
Pretoria

Email: commission@inqcomm.co.za

1st Floor
83 Central Street
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2198
PO Box 55045
Northlands 2116
Tel: +27 11 483-2387/483-0476
Fax: +27 11 728 - 0145
Direct e-mail: eric@mabuzas.co.za

Your Ref:
Our Ref: Mr. ET Mabuza
Date: Monday, June 25, 2018

Dear Judge Nugent,

Commission of Inquiry into Tax Administration & Governance by SARS

1. Thank you for your letter dated 23 June 2018, in which you invite us to make submissions at 10h30 on Tuesday 26 June 2018.
2. Unfortunately due to the short notice and our other pressing commitments we will only be able to attend the hearings on 29 June 2018.
3. All our client's rights are reserved.

Yours faithfully



MABUZA ATTORNEYS

Commission

From: Commission
Sent: 25 June 2018 11:08 AM
To: eric@mabuzas.co.za
Subject: RE: Communication from Judge Nugent 23/06/2018

Dear Mr Mabuza

I note your response. For the moment will you anticipate that I will hear you at 09h00 on 29th but I will confirm that in the course of the week.

Yours faithfully
Judge Nugent

From: Eric Mabuza [<mailto:eric@mabuzas.co.za>]
Sent: 25 June 2018 10:15 AM
To: Commission <commission@inqcomm.co.za>
Subject: RE: Communication from Judge Nugent 23/06/2018
Importance: High

Dear Judge Nugent,

Please see attached letter.

Best,

Eric T Mabuza
Mabuza Attorneys
1st Floor, 83 Central Street
Houghton, 2198
Tel: (011) 483-2387/483-0476
Fax: (011) 728-0145
Cell: 082 561 1067
E-mail: eric@mabuzas.co.za

From: Commission <commission@inqcomm.co.za>
Sent: Saturday, 23 June 2018 3:46 PM
To: eric@mabuzas.co.za
Subject: Communication from Judge Nugent 23/06/2018

Dear Mr Mabuza

Kindly find communication attached for your information.

Kind regards

Commission



Judge R Nugent
2nd Floor, Hilton House
570 Fehrsen Street
Brooklyn
Pretoria

Email: commission@inqcomm.co.za

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83 Central Street
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PO Box 55045
Northlands 2116
Tel: +27 11 483-2387/483-0476
Fax: +27 11 728 - 0145
Direct e-mail: eric@mabuzas.co.za

Your Ref:
Our Ref: Mr. ET Mabuza
Date: Wednesday, June 27, 2018

Dear Judge Nugent,

Commission of Inquiry into Tax Administration & Governance by SARS

1. We refer to your email dated 23 June 2018.
2. We have made certain arrangements to make an appearance at the hearing on Friday at 09h00 as indicated in your email, subject to confirmation.
3. Your failure and/or delay to confirm at this late hour the time is prejudicial to us in that we need to prepare for such an appearance and to keep counsel available which can obviously not be done overnight.
4. We wait to hear from you as soon as possible.

Yours faithfully

A handwritten signature in black ink, appearing to read 'Eric T Mabuza', written over a horizontal line.

MABUZA ATTORNEYS

Commission

From: Commission
Sent: 28 June 2018 06:58 AM
To: eric@mabuzas.co.za
Subject: RE: Communication from Judge Nugent 23/06/2018

Dear Mr Mabuza

My apology for the delay. You may advance submissions on behalf of your client on Friday morning 29 June. We will be commencing half an hour later than originally advised, at 09h30.

Yours faithfully
Judge Nugent

From: Eric Mabuza [<mailto:eric@mabuzas.co.za>]
Sent: 27 June 2018 05:24 PM
To: Commission <commission@inqcomm.co.za>
Subject: RE: Communication from Judge Nugent 23/06/2018
Importance: High

Dear Judge Nugent,

Please see attached letter.

Best,

Eric T Mabuza
Mabuza Attorneys
1st Floor, 83 Central Street
Houghton, 2198
Tel: (011) 483-2387/483-0476
Fax: (011) 728-0145
Cell: 082 561 1067
E-mail: eric@mabuzas.co.za

From: Commission <commission@inqcomm.co.za>
Sent: Saturday, 23 June 2018 3:46 PM
To: eric@mabuzas.co.za
Subject: Communication from Judge Nugent 23/06/2018

Dear Mr Mabuza

Kindly find communication attached for your information.

Kind regards

Commission

Judge R Nugent
2nd Floor, Hilton House
570 Fehrsen Street
Brooklyn
Pretoria

1st Floor
83 Central Street
Houghton
2198
PO Box 55045
Northlands 2116
Tel: +27 11 483-2387/483-0476
Fax: +27 11 728 - 0145
Direct e-mail: eric@mabuzas.co.za

Email: commission@inqcomm.co.za

Your Ref:
Our Ref: Mr. ET Mabuza
Date: Sunday, July 01, 2018

Dear Judge Nugent,

Commission of Inquiry into Tax Administration & Governance by SARS

1. Thank you again for granting our client the opportunity to address you regarding his objections to, *inter alia*, the conduct and continuation of your Commission of Inquiry.
2. You indicated that your ruling(s) will be handed out at 14h00 on Monday 2 July 2018.
3. We are instructed to bring to your attention the fact that our client is of the view that the Commission was improperly constituted on Friday 29 June 2018 when his application was heard and a further witness was subsequently called more particularly in that:
 - 3.1. The assistants ought to form an integral part of the panel. Although an explanation was given by you in respect of Professor Katz, nothing was said about the curious absence of the other two assistants.
 - 3.2. It was in any event improper to allow an application essentially for Professor Katz to recuse himself in his absence.

4. Furthermore in relation to the point argued by you at the hearing that you are the only Commissioner, we wish to bring to your attention the judgment of *S v Malindi & others [1990] 4 All SA 45 (AD)* which concerned the recusal of an assessor who would be in the same or an analogous position as your three assistants "appointed by the President". Your attention is specifically drawn to paragraph 43 of the judgment. A copy of the judgment is attached for your convenience. There are several other authorities in our law dealing with the recusal of assessors.
5. We deliberately raise these issues before your ruling is announced so that you can take them into consideration and, if you so choose, deal with and address them in your ruling.
6. Due to the inherent urgency of the matter, Commissioner Moyane hereby waives or abandons any rights he might have to raise these matters formally by way of oral submissions and he relies solely on the contents of this letter.

Yours faithfully

A handwritten signature in black ink, appearing to read 'Mabuza Attorneys', is written over a horizontal line.

MABUZA ATTORNEYS

Commission

From: Commission
Sent: 23 July 2018 12:56 PM
To: eric@mabuzas.co.za
Subject: Public Hearings in August 2018
Attachments: Public Hearings Notice 17 July 2018 (3).pdf

Dear Mr Mabuza

Attached is a notice of forthcoming public hearings for your information and as a courtesy to your client.

Warm regards
Carol Steinberg
Advocate for the Commission

Commission of Inquiry into Tax Administration and Governance by SARS 5.4.1

Hilton House, 2nd Floor, 570 Fehrsen Street, Brooklyn, 0181

Contact number: (012) 6479486

E-Mail: commission@inqcomm.co.za

www.inqcomm.co.za

PRESS RELEASE

Kindly take note that the second session of the Commission's public hearings will take place from 21 to 24 and from 28 to 31 August 2018 commencing at 09:00 at the following venue:

**The Auditorium
Linton House, 2nd Floor
Brooklyn Bridge
570 Fehrsen Street
Brooklyn, Pretoria**

The witnesses who will be required to give evidence at the hearings will be finalised shortly before the hearings take place and will be made available when that has occurred.

Hilton House, 2nd Floor, 570 Fehrsen Street, Brooklyn, 0181

Contact number: (012) 6479486

E-Mail: commission@inqcomm.co.za

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Mr Eric T Mabuza
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1st Floor, 83 Central Street
Houghton, 2198
E-mail: eric@mabuzas.co.za

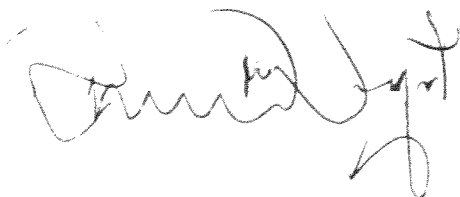
7 August 2018

Dear Mr Mabuza

I write to enquire whether your client wishes to respond to the evidence given at the Commission's public hearings, a transcript of which is attached for your convenience, or wishes to present evidence on other matters relevant to the inquiry.

Should he wish to do so he is invited to make arrangements to meet with counsel for the Commission to enable counsel to assess the evidence he wishes to present, to identify in what respect and to what extent there is a basis for the evidence, and to secure documents that might be relevant to the evidence. Once having done so, evidence of your client that is considered to be of assistance to the inquiry will be presented through counsel for the Commission, in the manner outlined in my ruling, of which you are aware.

Yours faithfully



Judge Nugent

Commissioner



Judge Nugent
2nd Floor, Hilton House
570 Fehrsen Street
Brooklyn
Pretoria

Email: commission@inqcomm.co.za

1st Floor
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PO Box 55045
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Tel: +27 11 483-2387/483-0476
Fax: +27 11 728 - 0145
Direct e-mail: eric@mabuzas.co.za

Your Ref:
Our Ref: Mr. ET Mabuza
Date: Monday, August 20, 2018

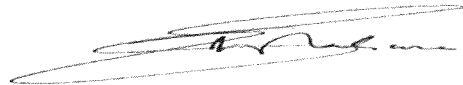
Dear Judge Nugent,

Commission of Inquiry into Tax Administration and Governance by SARS

1. We refer to your letter dated 7 August 2018 inviting our client to make arrangements with counsel for the Commission should he wish to participate in the proceedings.
2. On 2 July 2018, following your rulings, we addressed a letter to the Honourable President demanding *inter alia* that he should disestablish or stay one or both of the inquiries against our client and the removal of Professor Michael Katz as your assistant.
3. On 5 July 2018 we received a letter from the President indicating that he was going to await the ruling of Adv Bham SC in respect of our preliminary objections before making a decision on our client's demands.
4. On 31 July 2018 we received a ruling of Adv Bham SC on our preliminary objections.
5. On Friday 17 August 2018, more than a month after your rulings and our demands to the President, we received a letter from the President indicating that he was going to proceed with both inquiries. He also refused to remove Professor Katz.

6. It is obvious that we need to take instructions from our client on *inter alia* whether or not to mount a legal challenge against either the decision of the President or your ruling(s)/decision(s) or the ruling(s)/decision(s) of Adv Bham SC or all of the aforesaid decisions.
7. We expect to consult with and obtain legal opinion from our senior counsel later in the week.
8. In the interim and until such time as we have finalised the consultations we will not be in a position to respond, one way or the other, to your invitation to attend the proceedings.
9. We will inform you of our client's chosen cause of action as soon as we have finalised the consultations with counsel.
10. All our client's rights are reserved.

Yours faithfully



MABUZA ATTORNEYS

Commission of Inquiry into Tax Administration and Governance by SARS

5.7

Hilton House, 2nd Floor, 570 Fehrsen Street, Brooklyn, 0181

Contact number: (012) 6479486

E-Mail: commission@inqcomm.co.za

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Mr Eric T Mabuza
Mabuza Attorneys
1st Floor, 83 Central Street
Houghton, 2198
E-mail: eric@mabuzas.co.za

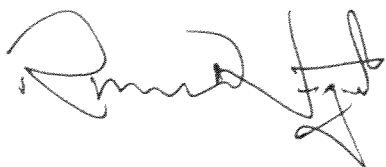
27 August 2018

Dear Mr Mabuza

You will be aware that oral evidence was given at the public hearings of the Commission last week. A transcript of the evidence is available on the Commission's website.

I write to ask whether your client wishes to respond to the evidence. If so he is invited to contact counsel for the Commission, as indicated in my earlier letter dated 7 August 2018.

Yours faithfully



Judge Nugent

Commissioner

Commission

From: Commission
Sent: 05 September 2018 08:32 AM
To: 'eric@mabuzas.co.za'
Subject: FW: Transcript - Sars inquiry
Attachments: 180831sars.pdf; 180831sars.ptx

For your information

Secretariat of the Commission

Commission

From: Commission
Sent: 17 September 2018 09:24 AM
To: eric@mabuzas.co.za
Subject: Commissioner to the Commission of Inquiry into Tax Administration and Governancy by SARS
Attachments: PUBLIC HEARINGS 25-28 SEPTEMBER 2018.pdf
Importance: High

Dear Mr Mabuza

The above matter refers.

Please find herewith the media release for the forthcoming public hearings for your information.

Kind regards
Commission of Inquiry Secretariat

From: Commission
Sent: Friday, 07 September 2018 11:40
To: eric@mabuzas.co.za
Subject: Communication from Judge Nugent: Commissioner to the Commission of Inquiry into Tax Administration and Governancy by SARS

Dear Mr Mabuza

Kindly find a letter from Judge Nugent for your attention.

Kind regards

Secretary to the Commission of Inquiry

Hilton House, 2nd Floor, 570 Fehrsen Street, Brooklyn, 0181

Contact number: (012) 6479486

E-Mail: commission@inqcomm.co.za

www.inqcomm.co.za

Mr Eric T Mabuza
Mabuza Attorneys
1st Floor, 83 Central Street
Houghton, 2198
E-mail: eric@mabuzas.co.za

7 September 2018

Dear Mr Mabuza

The Commission is required to submit an interim report to the President by no later than the end of September 2018.

You will be aware, from the transcripts that have been furnished to you, of the evidence that has been given thus far in public hearings, and of documentary evidence in the public domain, being a report from KPMG commissioned by your client, and the records of court proceedings initiated by your client. Your client has been invited on more than one occasion to respond to the evidence but has failed to respond to those invitations.

The Commission is considering reporting to the President that that evidence discloses the facts summarised below, which have not been contradicted by any submissions received or by contrary evidence:

1. The situation at SARS today is one that is wracked with fear, suspicion and distrust amongst managerial employees. The information technology is falling behind and degenerating as new technology advances, a fragmented structure exists that inhibits collaboration amongst functions to the detriment of revenue collection, space exists for the illicit trade to flourish, long-serving skilled employees found themselves in supernumerary posts and have left in exasperation, and others who remain are in supernumerary positions with their skills not being utilised, and the relations between

your client and other State institutions has broken down, all of which is to the ongoing detriment of revenue collection.

2. The above has been brought about by events under the tenure of your client, the more prominent of which are summarised in what follows.
3. Within weeks of taking office your client denounced and humiliated the members of EXCO by saying, in the presence of their subordinates, that he had no confidence in them, and suspending the future operation of EXCO, based on a newspaper report of a 'rogue unit' within SARS, when there was no basis for believing that all members of EXCO would have had knowledge of the allegations in the report, thereby sowing seeds of managerial disruption, distrust and suspicion within SARS.
4. Your client suspended the modernisation programme that had been in the making for a decade, for no good reason and without consultation with the employees concerned with the programme, to the detriment of the programme.
5. He suspended Mr Pillay and Mr Richer, later commenced disciplinary proceedings against them, and they subsequently resigned. Mr Ravele also resigned after allegations made by your client that he had engaged in corrupt activities. By the time EXCO was resuscitated in early 2015 it had been denuded of its managerial expertise and experience, through the resignation of Mr Hore, the departure of Mr Head, and the suspension of Mr Pillay and Mr Richer.
6. It is premature for the Commission to consider whether the suspensions and disciplinary proceedings were justified or not because we await further evidence before considering that question. What is relevant to the Commission's consideration is only that it plunged senior management into disarray.
7. Your client engaged KPMG to investigate allegations of the existence of a 'rogue' unit particularly so far as Mr Pillay and Mr Richer might be implicated, at a cost of about R24 million (later to be repaid by KPMG), which made damning allegations against Mr Pillay that were leaked to the media, causing further reputational damage to SARS and its former senior management. The Commission has not considered whether those allegations were true or not, and is considering only what effect it had on morale within the organisation. Criminal charges were brought against Mr Pillay and others, and criminal charges were also commenced against Mr Pillay, Mr Magashula and Mr Gordhan, that were later withdrawn, which must have exacerbated the situation.
8. All the above contributed to the fear, distrust and suspicion that continues to pervade SARS today. In that atmosphere, and amidst disarray and uncertainty in senior

management, your client appointed Bain & Co to review the SARS operating model for no apparent good reason. After a perfunctory diagnostic inquiry, with little or no consultation with managerial staff, and no communication to staff, a new operating model was devised, which was presented to staff as a *fait accompli*, creating uncertainty and anxiety amongst managerial staff.

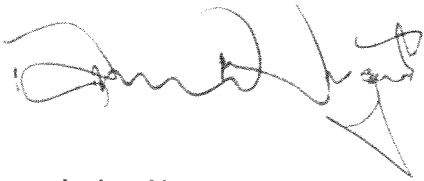
9. The implementation of the new model by your client and senior management of SARS, without a proper strategy for change, displaced about 200 employees from their jobs, creating anxiety and uncertainty, resulting in skilled and experienced employees ending up in supernumerary positions, which caused many to leave, and others remain in SARS with their skills not being utilised.
10. The implementation of the model reduced the effectiveness of SARS, particularly so far as it eviscerated the Large Business Centre, fragmented other functions, and allowed space for the illicit trades to exploit.
11. Your client's relationship with other State institutions with whom collaboration is essential – the Treasury, the Davis Tax Committee, the Auditor-General and the Financial Intelligence Centre – has broken down.
12. Your client has allowed SARS to be brought into disrepute in the public mind, by attempting to muzzle and intimidate the media through litigation on spurious grounds, in place of addressing matters reported in the media.
13. No responsible leader of a major and complex organisation that was functioning to world standards would have disrupted it as Mr Moyane did at SARS in the manner indicated above.
14. In summary, with no experience of the complexities of the organisation, your client denounced and humiliated its senior management and sowed the seeds of suspicion and distrust; he threw a world class institution into uncertainty, leaving SARS wracked with fear, suspicion and distrust, its information technology degenerating, its structure fragmented, space for the illicit trade to flourish, long-serving skilled employees being driven out and many who remain in supernumerary positions, and relations between SARS and other State institutions have broken down, all of which has caused damage to SARS, and through that the country, causing ongoing loss of revenue.

On the basis of the above the Commission is considering reporting to the President that the state of affairs at SARS, with ongoing loss of revenue has been brought about by reckless

mismanagement on the part of your client, and cannot be permitted to continue. It is considering recommending to the President that in the interest of SARS and the country, your client should immediately be removed from office, and be replaced by another person as Commissioner.

Should your client wish to make submissions on why the Commission should not report to the President in the terms summarised above, he should do so in writing by no later than 21 September 2018, so that his submissions may be considered before the Commission reaches its conclusions.

Yours faithfully

A handwritten signature in black ink, appearing to read 'Judge Nugent', written in a cursive style.

Judge Nugent

Commissioner



Judge Robert Nugent
2nd Floor, Hilton House
570 Fehrsen Street
Brooklyn
Pretoria

Email: commission@inqcomm.co.za

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Fax: +27 11 728 - 0145
Direct e-mail: eric@mabuzas.co.za

Your Ref:
Our Ref: Mr. ET Mabuza
Date: Friday, September 21, 2018

Dear Judge Nugent,

Commissioner Thomas Swabihi Moyane: Disciplinary Inquiry

1. We refer to your letter dated 7 September 2018. We have now had the opportunity to consult with our client, Commissioner Tom Moyane, and to engage with the contents of your letter.
2. It would seem necessary to remind you of the previously articulated stance of our client and his attitude towards the unlawfulness of the proceedings of the inquiry, *modus operandi* and composition.
3. These matters were raised extensively, both in writing and orally by Senior Counsel, on 29 June 2018. We refer you to the relevant documents submitted to you and the transcript of the hearing on that day. For the sake of completion, we also refer you to the written ruling which you issued in respect thereof on 2 July 2018. Needless to say, our client strongly disagrees with your findings, not to mention the *ad hominem* and personal attacks on him and his counsel.
4. In a nutshell, our client remains of the firm view that yours is an unlawfully appointed inquiry, which constitutes nothing but an inherently biased process and witch-hunt against him. He also contends, as you know, that the President ought not to have appointed your Commission whilst the Disciplinary Proceedings into



the fitness of our client for office and/or the alleged breakdown of the relationship between him and the President due to alleged misconduct on his part, is simultaneously underway. Finally, he separately complains of perceived bias on the part of Mr Michael Katz and you as Commissioner.

5. At the hearing and in your ruling, you emphatically denied the obvious existence of an overlap between your and the Disciplinary Inquiry chaired by Advocate Bham SC. Your startling intention, stated in your letter, to recommend to the President that "*in the interest of SARS and the country, (Commissioner Moyane) should immediately be removed from office and be replaced by another person as Commissioner*", which is the very same outcome intended by the President when he appointed the Disciplinary Inquiry, betrays that the professed differentiation between the two inquiries, as it concerns Commissioner Moyane, has always been and remains a fallacy.
6. At the risk of unnecessary repetition, we are instructed to inform you that your Commission has no legal authority to make that and any of the other "findings" postulated in your letter because, *inter alia*:
 - 6.1. The simultaneous appointment(s) and proceedings of yours and the Disciplinary Inquiry is, in the circumstances, unfair and unlawful and in violation of the provisions and values of the South African Constitution and Bill of Rights.
 - 6.2. Contrary to your assertions, our client has never actually been invited to participate meaningfully in your Commission. For example, unlike all other "witnesses", our client has never been contacted by the Evidence Leaders of your Commission. The attendance at the Commission on 29 June was specifically at our request, which you kindly granted.
 - 6.3. Our client does not have the resources to secure proper legal representation at your Commission. He has been denied such representation in spite of the fact that he is still the incumbent SARS Commissioner and ought to be

granted such representation and related support. You have already clearly indicated that this is none of your concern.

- 6.4. Your Commission's selection and sequencing of witnesses was deliberately designed and skewed to reach a predetermined outcome, as outlined in your letter. From the start, no effort whatsoever was made to secure the real and meaningful participation of those people anticipated to be opposed to that predetermined outcome and narrative. Such people, including our client, have instead been treated unfairly and with undue hostility.
- 6.5. You have since publicly admitted to holding an unlawful and undisclosed meeting with Mr Pravin Gordhan before he "testified" at your Commissioner as a "witness". Such conduct is unlawful and unheard of and disqualifies you to act as an impartial chair of the Commission.
- 6.6. The unwarranted remarks made in your ruling further and separately confirm your disqualification.
- 6.7. The inclusion and presence of Professor Michael Katz in your panel of assistants is unlawful and in breach of the rules of natural justice, in particular the rule *nemo sua in indicio*. Katz is, to your knowledge, the chair of ENS Africa Attorneys and he and them represent President Ramaphosa in ongoing and sensitive litigation to do with his alleged involvement in causing and instigating the alleged murder and massacre of 34 workers in Marikana in 2012. Katz and/or ENS have also represented Ramaphosa in many other personal and business matters. Katz has admitted to you in writing that:

"The litigation department of ENS, conducted by one of our partners, Doug Molepo, is representing President Ramaphosa."
- 6.8. You nevertheless ruled that these conflicts do not bother you and that you are "grateful" that he was appointed by the President.

- 6.9. Katz is further and additionally disqualified to play the role he is playing in your Commission due to his and his firm's involvement in ongoing litigation against SARS, which is the subject of a scandal which was the subject of a publicly available article which was published in both the print and electronic versions of the Mail and Guardian newspaper. A copy of the exposé is in any event annexed hereto for your attention. It is understood that your Mr Katz is the head of the ENS Tax Division, which is embroiled and implicated in the said scandal.
- 6.10. We have also subsequently learnt that the other two assistants are also possibly disqualified, unsuitable and/or tainted in that, during the period under investigation:
 - 6.10.1. Advocate Masilo was allegedly an employee of SARS; and
 - 6.10.2. Mr Khahla was a member of the SARS Audit Committee.
- 6.11. The "witnesses" subsequently called and/or selected after your ruling were also seemingly biased and hostile towards our client, rendering their evidence irrelevant and inadmissible.
7. We have also been reliably informed by a whistle-blower that your Commission has separately made inappropriate contact with Judge Kroon and Advocate Muzi Sikhakhane SC, with a view to *ex post facto* influencing those of their decisions which do not conform to the narrative contained in your letter. In this regard, we are instructed to demand, as we hereby do, that you urgently furnish us with all copies of any correspondence exchanged between your Commission and the two persons, on or before 24 September 2018, failing which other legal avenues for obtaining the same will be explored.
8. All your letters allegedly "inviting" our client to participate in the unlawful Commission, without addressing any of the issues raised above and previously, constitute empty and hollow words. Our client is not prepared to legitimise such a

flawed and unlawful process as your Commission until such time as his legitimate concerns have been addressed.

9. Insofar as you stated that the issue of the simultaneous Inquiries and the appointment of Professor Katz were matters outside your jurisdictional powers, which fall within the exclusive powers of the President, our client did refer those matters to the President for determination and he elected not to engage with them, thereby automatically rejecting them and effectively endorsing, *inter alia*, your unlawful ruling.
10. In the circumstances, our client has been left with no other option but to approach the Constitutional Court for relief, which includes reviewing and setting aside your ruling. This eventuality was clearly intimated to you and expressly anticipated in the penultimate paragraph of your ruling. The application was delayed, *inter alia*, by a request from the President to await the outcomes of separate objections brought before Bham SC. Both you and Bham SC will be cited in the Constitutional Court application, as second and third respondents respectively. You will accordingly be served with the court papers shortly but no later than Wednesday 26 September 2018.
11. In view of all the aforegoing, we are instructed to demand, as we hereby do, that you must refrain from acting as contemplated in your letter, which will only serve to exacerbate the situation and to further and gratuitously violate our client's constitutional and reputational rights. In this regard, we await your urgent response.
12. This correspondence will be made available to the Constitutional Court for ease of reference.

Yours faithfully



MABUZA ATTORNEYS

Commission of Inquiry into Tax Administration and Governance by SARS

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25 September 2018

Dear Mr Mabuza

I am in receipt of your letter dated 21 September 2018.

Once separated from the abuse, to which I will naturally not be responding, I find nothing in your letter that satisfies me the Commission, or any of its personnel, has acted unlawfully.

To clarify some of the issues that you raise, though not necessarily exhaustively, your client has at all times been represented by you, and for that reason he has not been contacted directly, in accordance with ordinary etiquette. Through you he has been invited on more than one occasion to engage with counsel for the Commission should he wish to present evidence. If your client would prefer future contact with him to be direct, kindly advise me and furnish his address.

The concurrence of the Commission of Inquiry and the disciplinary proceedings was dealt with in my earlier ruling, in which I indicated that, at least for the moment, the Commission would not be inquiring into the issues that are the subject of the disciplinary proceedings, and thus far it has not done so. That the Commission is considering recommending the removal of your client from office on separate grounds does not seem to me to be relevant. If that is a conclusion properly arrived at on the evidence before the Commission, a matter upon which your client was invited to make submissions, then I do not see why it is unlawful to recommend it.

Witnesses have been called according to those who have been willing and available to inform the Commission on matters relevant to its terms of reference. One such witness has been Mr Gordhan, whose explanation of the operating model that existed at SARS was

invaluable as a starting point for the inquiry, as will be apparent from the evidence that followed upon his.

Indeed, I am pleased that I took the opportunity at the outset to obtain from Mr Gordhan an explanation of what the 'operating model' meant, which was extremely helpful in setting the inquiry on its course. I have always found it a good idea when inquiring to begin at the beginning, and at SARS the beginning was the operating model devised by Mr Gordhan.

I might add that I have met many others in the course of the inquiry to enable myself to be properly informed, including, I might add, one who said he belonged to the 'Moyane faction' within SARS, whatever that might mean, and I will continue doing so if I consider it will assist to reach properly informed conclusions.

It is not clear to me what other witnesses you have in mind who you believe ought to have been called. If you are aware of witnesses with relevant information who are willing to give evidence, please let me know who they are and I will arrange for counsel to contact them. I would be obliged if you would do so without delay as time is moving on.

I have dealt with the position of Mr Katz in my ruling and see no need to repeat it. Adv Masilo was indeed formerly employed by SARS, and I understand Mr Kahla was at one time on its external audit committee, and the same considerations apply to them.

I am not sure why you consider the person who informed you that I have been in contact with Adv Sikhakhane and Judge Kroon to be a 'whistle blower'. I would have thought it obvious from the important part both played in events that occurred at SARS that I would be in touch with them. Indeed, Judge Kroon will be giving evidence on Friday. I remind you that this is an inquiry, and the purpose of an inquiry is to inquire. You are welcome to view the correspondence once you inform me that they have consented.

I'm afraid nothing in your letter persuades me that it will be unlawful to recommend to the President that your client should be removed from office if that is the conclusion reached by the Commission. In those circumstances I am not willing to give you the undertaking you request.

Yours faithfully

(sent electronically)

Judge Nugent
Commissioner