

27 November 2017

To: The Chairperson
The Standing Committee
on Finance
Parliament of the Republic of
South Africa

c/o: Email (pmbele@parliament.gov.za /
awicomb@parliament.gov.za)

And to: The Presidency of the
Republic of South Africa

c/o: Email (bongani@presidency.gov.za /
milka@presidency.gov.za)

And to: The Minister of Finance

c/o: Email (Vuyiswa.Monye@treasury.gov.za /
Mayihlome.Tshwete@treasury.gov.za)

Dear sirs,

INQUIRY BY THE STANDING COMMITTEE ON FINANCE INTO THE SOUTH AFRICAN REVENUE SERVICE

INTRODUCTION

1. The Organisation Undoing Tax Abuse (OUTA) is a proudly South African non-profit civil action organisation, comprising of and supported by people who are passionate about improving the prosperity of our nation, combat corruption and the abuse of public funds. OUTA was established to challenge the abuse of authority, in particular the abuse of taxpayers' money.
2. OUTA deems it important to assist the Standing Committee on Finance ("SCOF") and the Standing Committee on Public Accounts in executing their mandate in the best interest of South Africa. What is set out below, is a chronological illustration of recent events that have plagued the South African Revenue Service ("SARS").

FINDINGS BY THE FINANCIAL INTELLIGENCE CENTRE ("FIC")

3. In May 2016, the FIC in its report to the SARS Commissioner highlighted a series of unusual and suspicious cash deposits and payments into the personal bank accounts of

ORGANISATION UNDOING TAX ABUSE (OUTA)

Co Reg: 2012/064213/08 NPO #: 124381NPO

DIRECTORS: Wayne L Duvenage, Leopold J J Pauwen, Benjamin Theron

NON EXECUTIVE DIRECTORS: Phumlani M Majoji, Ms Ferrial Adam (Chairperson)

two SARS employees namely Mr Jonas Makwakwa (“Makwakwa”), SARS Chief Executive Officer (“CEO”) and Kelly-Ann Elskie (“Elskie”), a SARS employee and partner of Makwakwa.

4. An extract of the FIC’s report is attached hereto and marked “**ANNEXURE OUTA1**.”
5. Between 1 March 2010 and 31 January 2016, a total of R785 130.00 was deposited into Makwakwa’s personal bank account. The FIC stated that these irregular payments be “...investigated to determine whether there were any misrepresentations or fraud on the part of [Makwakwa] that resulted in SARS making these payments”.
6. Between 22 and 24 December 2015, a total of R450 200.00 was paid into Elskie’s personal bank account. It was noted that these payments should be investigated to determine “whether the funds received constituted payments of proceeds of crime...” and “whether the... concealment and disguising of these funds constitute acts of money laundering...”.
7. Following the findings by the FIC, SARS failed to take all the appropriate remedial steps. SARS only suspended Makwakwa. It is reasonable to say that SARS’ reluctance to take more significant measures is directly attributed to the relationship between the Commissioner, Mr Tom Moyane (“Moyane”) and Makwakwa.
8. Moyane was heavily criticised by former Minister of Finance, Mr Pravin Gordhan, for his failure to act in the best interest of SARS who may well have been obstructing the course of justice. In order to avoid becoming the individual (by virtue of his office) to initiate the relevant criminal investigation into Makwakwa, Moyane approached the law firm of Hogan Lovells South Africa to conduct the investigation.
9. It should be noted, however, that SARS is under no legal obligation to appoint a law firm to conduct an investigation into alleged irregularities that may have transpired under its own guard. SARS has the legal authority and the necessary forensic-, audit- and investigative resources to pursue the recommendations of the FIC itself.
10. It would be reasonable to conclude (when one has regard to SARS’ prominent role in such sphere) that the outsourcing of an investigation is nothing other than “passing the buck”.

HOGAN LOVELLS SOUTH AFRICA

11. On or about September 2016, SARS appointed Hogan Lovells South Africa Incorporated to conduct an investigation into the suspicious- and unusual deposits and cash payments identified by the FIC above.

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12. In a letter dated 29 September 2016 and addressed to Mr Teboho Mokoena (SARS), Hogan Lovells provided legal advice and made recommendation in pursuit of FIC's recommendations. The letter is attached hereto and marked "**ANNEXURE OUTA2**".
13. The scope of the proposed investigation is set out from paragraph 13 to 38 and essentially divides it into 4 distinct segments. For ease of reference, these segments will be referred to as **REQUESTS A, B, C & D** respectively. These requests were accepted and approved by Moyane on behalf of SARS as Hogan Lovells' terms of reference. This is apparent from Moyane's signature on 4 October 2016 that appears on the last page of the letter.
14. In terms of **REQUEST A**, SARS is to determine whether a criminal offence in terms of the Prevention and Combatting of Corrupt Activities Act, 2014 ("PRECCA") had been committed by both Makwakwa and Elskie or not.
15. In terms of **REQUEST B**, SARS is to determine whether Makwakwa and Elskie committed tax evasion and other contraventions of the Tax Administration Act, 2011 ("TAA") or not.
16. In terms of **REQUEST C**, SARS is to determine whether Makwakwa and Elskie effected payments in contravention of internal policies and the Public Finance Management Act, 1999 ("PFMA") or not.
17. In terms of **REQUEST D**, SARS is to determine whether Makwakwa and Elskie committed acts of money laundering in terms of the Prevention of Organised Crime Act, 1998 ("POCA") or not.
18. For contextual clarification, the letter constituted an "offer and acceptance" between SARS and Hogan Lovells.

MAKWAKWA'S SUSPENSION AND BONUS PAYMENTS

19. Makwakwa was formally suspended in September 2016. He was suspended only after aspects of the FIC report was disclosed and reported on in the media. SARS only then sought a legal opinion after it had received the FIC's findings.
20. In the submission, it appears that Hogan Lovells recommended that disciplinary action be taken against Makwakwa. Hogan Lovells facilitated the disciplinary proceedings and appointed Adv. Terry Motau SC as chair.
21. Upon conclusion of the disciplinary hearing, it was found that Makwakwa should be reinstated. He was to assume his previous position with effect from 1 November 2017.

Makwakwa was suspended for approximately 14 months (September 2016 to November 2017).

22. During this period, Makwakwa received bonus payments totalling R930 000.00. These payments are apparent from the audited financial statements in the SARS 2016/2017 Annual Report.
23. It should be noted that the SARS Human Resources Policy (“HR Policies”) states that no bonuses are to be paid to employees on suspension. This was confirmed by Mr Teboho Mokoena when he appeared before this committee on or around 13 September 2017.
24. In the SARS 2016/17 financial statements, the AG declared the payment of bonuses by the SARS Commissioner, Moyane, to the SARS Executive without the necessary Ministerial approval, as irregular expenditure.

RECOMMENDED QUESTIONS TO WITNESSES

25. OUTA recommends that the SCOF poses the following questions to the relevant witnesses:
 - 25.1. Why did Moyane distribute the findings of the FIC to the parties implicated in the report?
 - 25.2. Why did SARS delay the implementation of the FIC’s recommendations?
 - 25.3. Why and on what basis did SARS decide to procure investigative services from Hogan Lovells?
 - 25.4. Did SARS at any point approach PriceWaterhouseCoopers (“PWC”) to conduct an investigation into the findings of the FIC?
 - 25.5. Why did Hogan Lovells deviate from its initial terms of reference set out in the attached letter?
 - 25.6. Did SARS instruct Hogan Lovells to deviate from the initial terms of reference?
 - 25.7. If so, which representative from SARS instructed Hogan Lovells to deviate from the initial terms of reference?
 - 25.8. Does SARS’ HR policies provide for bonus payments to employees that have been suspended?
 - 25.9. On what basis was the bonus in the amount of R930 000.00 paid to Makwakwa?

- 25.10. For what period (financial year) was Makwakwa's bonus calculated?
- 25.11. Was SCOF misled by SARS'S head of Human Resources who stated under oath that Makwakwa was not to receive a bonus payment?

CONCLUSION

26. South African law prohibits money laundering and the use of proceeds of crime. The Financial Intelligence Centre Act, 2001 ("FICA") among others, was enacted specifically to prevent money laundering. South Africa also subscribes to international laws, standards and prescriptions to prevent money laundering.
27. In terms of local- and international law, SARS plays an important role in the prevention and combatting of money laundering. Therefore, Parliament should take the Financial Intelligence Centre's ("FIC") reports of suspicious transactions (related to money laundering) by a senior SARS official as serious.
28. In several submissions to Parliament, SARS has emphatically stated that the reputation of a tax authority has an impact on tax "morality" of a country. It therefore stands to reason that SARS cannot effectively propagate tax morality nor enforce tax- and anti-money laundering legislation if its conduct or that of its most senior officials is not transparent and can withstand scrutiny.
29. In its 2016/2017 Annual Report, the Auditor General ("AG") classified the bonus payments paid by SARS to Mr Jonas Makwakwa ("Makwakwa") as irregular expenditure in terms of the Public Finance Management Act, 1999 ("PFMA"). SARS's Accounting Officer commits an act of financial misconduct in terms of section 81(1)(b) of the PFMA by making or permitting such irregular expenditure.
30. In terms of section 34 of the Prevention and Combatting of Corrupt Activities Act, 2014 ("PRECCA"), any person holding a position of authority, must report instances of corrupt activities to the South African Police Service ("SAPS"). Any person who fails to report such instances is guilty of an offence.
31. OUTA calls on SCOF to implement the necessary remedial action against the implicated individuals.
32. OUTA reiterates that SARS', but more specifically Moyane's, failure to report the conduct of both Makwakwa and Elskie, should not be construed as an insignificant omission, but rather as a crime itself.

RECOMMENDATIONS

33. It is with the above considerations that we write to you to urge Parliament and more specifically your committees to consider the following actions:
- 33.1. To compel SARS, as part of the Committee's functions, to fully disclose the following information:
- 33.1.1. All reports, including but not limited to the "interim" or "draft" reports, from Hogan Lovells Attorneys that relate to their investigations into Jonas Makwakwa and Kelly-Ann Elskie and the FIC report of May 2016; and,
 - 33.1.2. All forensic reports, including but not limited to the "interim" or "draft" reports, produced by PWC that relate to the FIC report of May 2016; and,
 - 33.1.3. All communication between Hogan Lovells and SARS that relate to above, including, but not limited to, communication between the representatives of Hogan Lovells, the head of the human resources division and the head of the employee relations namely Messrs Teboho Mokoena and Luther Lebelo; and,
 - 33.1.4. All communication between SARS and the Directorate for Priority Crime Investigation ("DPCI") that relate to their investigations into Jonas Makwakwa and Kelly-Ann Elskie and the FIC report of May 2016, including all "interim" and/or "draft" reports; and,
 - 33.1.5. The terms of reference/ scope of work of the PWC forensic investigation that relate to the FIC report of May 2016; and,
 - 33.1.6. The written instruction from either SARS or Hogan Lovells to Mr Motau SC to chair the disciplinary hearings; and,
 - 33.1.7. The transcripts of Jonas Makwakwa's disciplinary hearing; and
 - 33.1.8. The transcripts of Kelly-Ann's disciplinary hearing.
- 33.2. To recommend that the relevant criminal investigations as contemplated by both the PFMA and PRECCA be initiated and properly investigated.

- 33.3. To recommend to the Presidency and the Minister of Finance that, given the manner in which Moyane handled the Makwakwa/Elskie matter, he be suspended with immediate effect; and
- 33.4. To recommend to the Minister of Finance that Makwakwa be suspended again with immediate effect.
34. It cannot be overemphasised that SARS is legally mandated to combat corruption and money laundering. As the custodian of our country's taxes, the conduct of SARS and its leadership must be beyond reproach.
35. OUTA further calls upon SCOF to establish the status of the criminal complaints highlighted in the submissions made by Corruption Watch, attached hereto and marked "ANNEXURE OUTA3".
36. We trust that you find the above in order and look forward to hearing from you.
37. Kindly acknowledge receipt of this letter.

Yours Sincerely,



Ben Theron
Chief Operating Officer
OUTA – Organisation Undoing Tax Abuse
E-mail: ben.theron@outa.co.za

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Financial Intelligence suggests that the subjects:

MASHUDU JONAS MAKWAKWA¹ (ID 6901066129084) ("MJM"), employed by the South African Revenue Service ("SARS") as an Executive and Chief Officer: Business and Individual Taxes and **KELLY-ANN ELSKIE² (ID 8805160057083) ("KE")**, an employee at SARS, may be involved in or facilitating corrupt activities.

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

SUSPICIOUS AND UNUSUAL CASH DEPOSITS AND PAYMENTS INTO MJM's³ ACCOUNT

MJM's personal bank account⁴ is the primary account used to receive and disburse funds. Credits into this account have increased yearly⁵ from R1,358,817.01 in 2010 to R3,418,925.43 in 2015 (approximately 152%). Likewise, MJM's payments have grown over this period, creating a dependency on suspicious cash deposits and payments to maintain his current standard of living. These payments and cash deposits are of concern as they originate from unknown sources and undetermined legal purpose.

SUSPICIOUS AND UNUSUAL CASH DEPOSITS:

Between 01 March 2010 and 31 January 2016 seventy five (75) cash deposits⁶ totalling R785,130.00 were deposited into MJM's personal bank account; of which forty eight⁷ (48) cash deposits amounting to R726,400.00 was deposited between 2014 and 2015.

¹ See Annexure A. ID document of MJM.

² See Annexure B. ID document of KE (formerly JORDAAN).

³ FNB Private Wealth Cheque account 60066187648.

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

⁵ 01 March to 28 February of each financial year.

⁶ Deposits of coin and paper money of the Republic.

⁷ See Annexure C. FNB account 60066187648. Cash deposits marked in yellow.

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

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

In one cash deposit of R68,000.00, MJM was confirmed as the depositor⁸.

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

On 25 September 2014, MJM exchanged foreign currency (US\$ 13,500.00) into South African Rand equal to R147,850.65⁹, which amount was credited to his personal bank account. The source of the foreign currency is unknown.

The volume and value of cash deposits are highly unusual, as MJM is permanently employed¹⁰. These afore-mentioned cash deposits should be investigated to determine whether these funds were received by this SARS employee constitute payments of proceeds of crime arising from corrupt activities as defined in the Prevention and Combatting of Corrupt Activities Act 12 of 2004 ("PRECCA"), in light of the position of authority held by MJM.

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

Further, it was also noted that other irregular and ad hoc payments from SARS were credited into MJM's personal bank account. The value of these payments¹¹ for the past two (2) financial years (2014 to 2015) amounted to R334,459.05 as compared to R82,635.30 between 2012 and 2013.

⁸ See Annexure D. Image of depositor.

⁹ See Annexure C FNB account 60066187648 (page 72).

¹⁰ See Annexure E. SARS official salary advice.

¹¹ See Annexure F. Table of ad hoc payments from SARS.

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

SUSPICIOUS AND UNUSUAL PAYMENTS:

On 11 February 2015, the DEPARTMENT OF WATER AFFAIRS AND FORESTRY¹² conducted a transfer to the entity NEW INTEGRATED CREDIT SOLUTIONS¹³ (Registration 2001/004355/07) to the value of R17,872,957.13¹⁴.

On the same day, NEW INTEGRATED CREDIT SOLUTIONS transferred R17,872,957.13¹⁵ to another account in the same name via an inter-account transfer.

On 12 February 2015, NEW INTEGRATED CREDIT SOLUTIONS conducted a subsequent inter-account transfer of R5,000,000.00¹⁶ between accounts held in the entity's name.

On 12 February 2015, the entity MAHUBE PAYMENT SOLUTIONS¹⁷ (Registration 2013/066828/07) received R4,468,239.28¹⁸ from NEW INTEGRATED CREDIT SOLUTIONS.

On 13 February 2015, MAHUBE PAYMENT SOLUTIONS made an internal electronic funds transfer ("EFT") payment of R4,200,000.00¹⁹ to a Standard Bank Savings account held in the name of the same entity.

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

¹³ See Annexure G. CIPC registration certificate.

¹⁴ See Annexure H. ABSA Call account 4053260748 (page 43).

¹⁵ See Annexure I. ABSA Call account 9105455793 (page 05).

¹⁶ See Annexure J. ABSA Cheque account 4058209511 (page 28).

¹⁷ See Annexure K. CIPC registration certificate.

¹⁸ See Annexure L. Standard Bank Bizlaunch account 241349907 (page 77).

¹⁹ See Annexure M. Standard Bank Savings account 226322955 (page 15).

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On 26 February 2015, MAHUBE PAYMENT SOLUTIONS made an internal electronic funds transfer (EFT) payment of R3,800,000.00²⁰ back to the Standard Bank Bizlaunch account.

Following this, on 26 February 2015, MAHUBE PAYMENT SOLUTIONS made an EFT payment of R3,813,300.00²¹ to the entity ARVOMARK²² (Registration 2012/113693/07).

Again, on 26 February 2015, ARVOMARK made an EFT payment of R3,420,000.00²³ to the entity CLIPPER FINANCIAL SERVICES²⁴ (Registration 2010/004515/07).

Immediately thereafter²⁵, CLIPPER FINANCIAL SERVICES made an EFT payment of R3,125,000.00²⁶ to MAHUBE PAYMENT SOLUTIONS.

On 04 March 2015, MAHUBE PAYMENT SOLUTIONS made an EFT payment of R1,254,000.00²⁷ to ARVOMARK.

On the same day²⁸, ARVOMARK made an EFT payment of R1,140,000.00²⁹ to the entity STREET TALK TRADING 181³⁰ (Registration 2011/075845/23), retaining R114,000.00, approximately 10% of the amount transferred.

Upon receiving this transfer, STREET TALK TRADING 181 immediately³¹ transferred R600,000.00³² to the entity BIZ FIRE WORX³³ (Registration 2012/023231/07).

BIZ FIRE WORX retained R120,000.00 and electronically transferred R480,000.00 in three (3) payments³⁴, into MJM's personal bank account as follows:

²⁰ See Annexure L. Standard Bank Bizlaunch account 241349907 (page 79).

²¹ See Annexure N. Standard Bank Business Current account 300120699 (page 57).

²² See Annexure O. CIPC registration certificate.

²³ See Annexure P. Standard Bank Business Current account 023210346 (page 255).

²⁴ See Annexure Q. CIPC registration certificate.

²⁵ 26 February 2015.

²⁶ See Annexure L. Standard Bank Bizlaunch account 241349907 (page 79).

²⁷ See Annexure N. Standard Bank Business Current account 300120699 (page 60).

²⁸ 04 March 2015.

²⁹ See Annexure R. Standard Bank Bizlaunch account 023071966 (page 55).

³⁰ See Annexure S. CIPC registration certificate.

³¹ 04 March 2015.

³² See Annexure T. Standard Bank Business Current account 421586427 (page 258).

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

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

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

These payments must be investigated to determine:

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

Six (6) days after receiving the last payment from BIZ FIRE WORX (13 May 2015), MJM made an EFT payment of R200,000.00³⁵ from his personal bank account to Mercedes Benz Financial Services for a Mercedes Benz C220 BLUETEC (Licence DR93JXGP), in favour of a Kelly-Ann ELSKIE ("KE").

SUSPICIOUS AND UNUSUAL CASH DEPOSITS INTO KE's ACCOUNT

Between 22 and 24 December 2015 three (3) cash deposits totalling R450,200.00 were deposited into KE's personal bank account³⁶.

The cash deposits³⁷ were structured into two (2) payments of R160,000.00 each and one (1) payment of R130,200.00.

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

KE was confirmed as the depositor³⁸ for two (2) of the cash deposits.

³⁵ See Annexure C. FNB account 60066187648 (page 35).

³⁶ See Annexure V. ABSA Account 4079460540. Statements for the period December 2013 to February 2016.

³⁷ See Annexure V. ABSA Account 4079460540 (page 57).

³⁸ See Annexure W. Image of depositor and accompanying persons.

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

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

These payments must be investigated to determine:

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

END.

OUTAZ



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The South African Revenue Services

Your ref Mr T Mokoena
Our ref L.Modise/J.Ewang/4290336
Matter ref: L04757

Email: TMokoena4@sars.gov.za

29 September 2016

Private and Confidential

Dear Sirs

INVESTIGATION: SOUTH AFRICAN REVENUE SERVICE

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

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

General Context in which Consultant operates

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

REQUEST A

- A. Whether the funds received by Makwakwa and Elskie constitute payment of proceeds of crime arising from corrupt activities as defined in PRECCA.**
13. PRECCA aims to provide amongst other things, measures to prevent and combat corruption and corrupt activities; to provide for the offence of corruption and offences relating to corrupt activities; and to provide for investigative measures in respect of corruption and related corrupt activities.
 14. The request from the FIC is in essence for Consultant to determine whether an offence in terms of PRECCA has been committed by Makwakwa or Elskie. Offences in terms of PRECCA constitute a criminal offence.
 15. The investigation of criminal offences ordinarily falls within the jurisdiction of the South African Police Services (SAPS). In our view criminal aspects of the allegations against these two employees (with the exception of offences in terms of tax legislation which Consultant would ordinarily investigate) should be referred to the SAPS for criminal investigation.
 16. It appears from the correspondence of Colonel Heap of the DPCI's Serious Corruption Investigation Component dated 15 September 2016 that an investigation is already underway. Colonel Heap however extended an invitation to Consultant to make contact and work in collaboration with its investigator assigned to the enquiry.
 17. The engagement and/or interaction between the DPCI and Consultant fall outside these terms of reference. The Hawks are currently dealing with the criminal investigation pertaining to the two SARS employees. The criminal investigation is being administered by the Hawks' Anti-Corruption Investigation Unit under DPCI enquiry: 03/06/2016. The Hawks and Consultant have already established a solid and harmonious working relationship in respect of the criminal investigation against the two employees. Consequently, the Firm shall be engaged by Consultant as and when required and on a need to know basis.
 18. According to the FIC report, Elskie made three cash deposits into her personal bank account. The sources of the funds are at this stage unknown and the deposits are deemed suspicious and unusual.
 19. Similarly, the investigation of the source of the funds to Elskie would constitute a criminal investigation and this aspect is currently being investigated by the DPCI.
 20. PRECCA imposes a reporting duty on any person who holds a position of authority and who knows or ought reasonably to have known or suspected that any other person has committed-
 - 20.1 an offence under Part 1 (*General offence of corruption*), 2 (*Offences in respect of corrupt activities relating to specific persons*), 3 (*Offences in respect of corrupt activities relating to receiving or offering of unauthorised gratification*) or 4 (*Offences in respect of corrupt activities relating to specific matters*), or section 20 (*Accessory to or after offence*) or 21 (*attempt, conspiracy and inducing another person to commit offence*) (in so far as it relates to the aforementioned offences) of Chapter 2 of PRECCA; or
 - 20.2 the offence of theft, fraud, extortion, forgery or uttering a forged document involving an amount of R100 000 or more, must report such knowledge or suspicion or cause such knowledge or suspicion to be reported to the police official in the Directorate for Priority Crime Investigation (DPCI).



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

REQUEST B

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

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



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

29. In order to determine if there has been a contravention of internal policies and/or the PFMA, Consultant will first need to establish the basis of the payments made by Makwakwa and Elskie as set out in the FIC report.
30. The payments to Makwakwa as listed in the FIC report can be divided into two categories:
- 30.1 Payment from entity Biz Fire Worx to Makwakwa (after a long sequence of money transfers between different entities emanating from an initial payment from the Department of Water Affairs and Forestry to New Integrated Credit Solutions); and
- 30.2 Ad hoc payments from Consultant to Makwakwa.
31. The FIC report notes that the payments made to Makwakwa which originate from Consultant¹ were ad hoc and irregular. Further that these payments should be investigated to determine whether Consultant has been defrauded and effected payments in contravention of internal policies and/or the PFMA.
32. It is essential to establish the source and basis of these ad hoc payments to Makwakwa. We are of the view that this process be undertaken in conjunction with Request B as that process will be able to establish the source of the funds, and whether there has been any contravention of Consultant's policies and/ or the PFMA.
33. Once the investigation into Requests B and C is completed, Consultant will be in a position to determine the appropriate disciplinary action against the employees.
34. The FIC report notes that the payment from Biz Fire Worx to Makwakwa and the prior money transfers between the various entities need to be investigated to determine if they constitute payment of proceeds of crime arising from corrupt activities on the part of Makwakwa and others, money laundering and/or give rise to an obligation for SARS under the PFMA and its accountability to the executive authority. This aspect should be reported to the SAPS for investigation as it falls squarely within its jurisdiction.
35. Once the basis of the payments made to Makwakwa by Consultant is established, our offices will be in a position to determine if there has been a breach of Consultant's internal policies and or the PFMA and recommend the manner in which the findings should be addressed.
36. In the event that the SAPS investigation and that conducted by the relevant internal personnel within SARS reveal that the payment to Makwakwa by Biz Worx constitutes an offence, we will also be in a position to assist Consultant to institute disciplinary action.

¹ See annexure F of the FIC report – table of ad hoc payment from SARS

REQUEST D

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

37. Money laundering as defined in section 4 of POCA constitutes an offence.
38. The investigation of criminal offences falls within the jurisdiction of the South African Police Service and such aspect of the FIC request should be reported to the SAPS for further investigation. Given that Colonel Heap is to be engaged further to seek the assistance of the DPCI to investigate Request A, we suggest that the engagement should also include Request D.

Conclusion

39. With regard to Request B, Consultant is under an obligation to determine whether Makwakwa or Elskie in their capacity as tax payers, have committed a tax offence given the information contained in the FIC report. This investigation must also include a determination of the basis of the ad hoc payments to Makwakwa as required under Request C.
40. In the event that Consultant establishes that Makwakwa or Elsie have committed an offence in contravention of any tax legislation or that there has been a contravention of internal policies and/or the PFMA then we are in a position to assist Consultant to institute disciplinary action against such employee.
41. We estimate that the investigation as per these terms of reference is to be concluded either at the end of October 2016 or the first week of November 2016. Consultant shall extend the time period if the Firm requires such an extension in order to conclude its investigation.
42. Once the investigation has been undertaken and if the outcome reveals that an offence has been committed by either Makwakwa or Elskie, we will be in a position to assist Consultant to initiate disciplinary action for misconduct against either of the employees in the employment context. This would involve drafting disciplinary charges against the employees, prosecuting the disciplinary enquiry, and the appointment of an external chairperson. The firm shall appoint either a retired judge who is knowledgeable in labour law or a Senior Counsel who is knowledgeable in labour law and with more than 15 years experience at the bar.
43. Should Consultant accept the terms as set out above, we request that the acceptance be confirmed by appending a signature below.
44. We advise accordingly.

Yours sincerely



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

For South African Revenue Service:



Signature: _____

Name: COMMISSIONER TOM MOYANE

Designation: COMMISSIONER, SOUTH AFRICAN REVENUE SERVICE

Date: 04 October 2016

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01 November 2017

Mr Yunus Carrim
Member of Parliament and Chairperson of the Finance Standing Committee
Per email: ycarrim@parliament.gov.za

Mr Malusi Gigaba,
Minister of Finance
c/o Ms Vuyiswa Monye
Personal Assistant to the Minister
Office of the Minister of Finance
Per email: Vuyiswa.Monye@treasury.gov.za

Dear Mr Carrim

REQUEST FOR PARLIAMENTARY INQUIRY RE SARS FINDING ON MR JONAS MAKWAKWA

1. Corruption Watch ("CW") is a civil society organisation that opened its doors to the public in January 2012. We are registered as a non-profit company in terms of the Companies Act.
2. Corruption Watch seeks to expose corruption and the abuse of public funds. We aim to expose those who engage in corrupt activities, nepotism and abuse of public funds in both the public and private sector.
3. As part of our mandate, we are committed to strengthening the criminal justice system, including efforts to address financial crime; to the refinement of our planning and procurement systems; and to supporting and strengthening the ability of private and public bodies to better detect and address corruption in their spheres of operation.

4. We note that the Finance Standing Committee ("Finance Committee") exercises oversight in respect of the South African Revenue Services and we wish to bring to your attention, our concerns about recent decisions which have been taken by the SARS Commissioner in relation to Mr Jonas Makwakwa, an individual who is alleged to have committed acts of fraud and corruption while occupying a senior managerial position at SARS.
5. Although you are well aware of this matter, we summarise the background to our complaint as well as our interventions thus far in the paragraphs below.

Background

6. On 17 May 2016, the Financial Intelligence Centre ("FIC") sent Mr Tom Moyane, Commissioner and CEO of the South African Revenue Services ("SARS"), a report detailing fraud and corruption on the part of Mr Jonas Makwakwa and Ms Kelly-Ann Elskie, both SARS employees. We understand that they were alleged to have committed crimes in terms of the Prevention and Combating of Corrupt Activities Act 12 of 2004, ("PRECCA"), the Financial Intelligence Centre Act, 38 of 2001 ("FICA") and the Prevention of Organised Crime Act, 121 of 1998 ("POCA").
7. We wrote to Moyane on 25 October 2016 in order to find out what steps he was taking against the employees, as well as to find out more about his unlawful disclosure of the FIC report to the employees and his failure to report the corrupt activities to the Hawks, both in violation of PRECCA.
8. We indicated that we would lodge criminal complaints against the employees in respect of the allegations contained in the FIC report and against him in respect of his own unlawful actions. A copy of our letter is attached marked "A". Moyane responded to our letter on 27 October 2016, a copy of which is attached marked "B".
9. In this regard, we also wrote to the Director of the FIC, Mr Murray Mitchell and to the Head of the Hawks, Lieutenant-General Berning Ntlemeza. Our letters are attached "C" and "D" respectively. We received a response from the FIC, attached "E" but did not receive a response from the Hawks.

10. Having received unsatisfactory responses from SARS and the HAWKS as to the nature and status of any investigations into the matters, we proceeded to lodge criminal complaints against Moyane, Makwakwa and Elskie at the Brooklyn Police Station on 8 December 2016. Attached as annexures "F", "G" and "H" are copies of the criminal complaints under case numbers; 217/12/2016, 218/12/2016, and 222/12/2016 respectively.
11. On Tuesday, 3 January 2017 we received a message that Captain RD Mosuma would be investigating all three cases. However, we did not receive any further communication until the end of January 2017 when Captain Mosuma contacted us to arrange a meeting. We met with him on Monday, 8 February 2017, and we were advised that the Hawks were handling an "inquiry" in respect of the FIC report against Makwakwa and Elskie. Although we raised pertinent questions about the nature and scope of this "inquiry" as opposed to a proper investigation, we were not provided with further information. We were also not informed as to what was being done in respect of the criminal complaint against Moyane.
12. We subsequently addressed a letter to Brigadier Makinyane on 21 February 2017 in order to find out more about the "inquiries" which were being conducted by the Hawks. A copy of this letter is attached marked "I" and we confirm that to date, we have not received a response. We have continued to follow up with the Hawks on this matter but have had no official response thus far. Our most recent correspondence to the Hawks as well as to the National Prosecuting Authority ("NPA") is attached marked "J" and "K".

Corruption Watch Enquiry

13. We now understand through a variety of media reports on this issue that Mr Makwakwa has returned to work and that an internal disciplinary inquiry has cleared him of all wrong doing.
14. We are very concerned about the processes followed in this matter and have written to the SARS Commissioner for clarity on the nature and scope of the disciplinary inquiry as well as information on the reports which were used to clear Mr Makwakwa of wrongdoing. A copy of our letter to the SARS Commissioner is attached marked "L".

15. In light of the Finance Committee's oversight role in respect of SARS, we request the Committee to urgently inquire into the processes followed by SARS, processes which have been shrouded in secrecy and which have resulted in Makwakwa being cleared of all wrong doing and him being allowed to return to work.
16. We also request the Finance Committee to take note of the conduct of Commissioner Moyane in informing the implicated individuals of the FIC report. We submit that his actions amounted to breaches of the FIC Act which attract criminal sanctions. In this regard, Annexure "F", attached hereto contains full details of the criminal charges which we have laid against Commissioner Moyane.
17. Finally, we have detailed above, the inaction of the Hawks and the NPA to investigate the charges laid against Makwakwa, Elskie and Moyane and would like the Committee to engage with the relevant Parliamentary committees to ascertain the cause of these delays.
18. We look forward to the Finance Committee's inquiry into this matter.
19. Please note that in the interests of transparency we may publish this correspondence and any response hereto.

Yours faithfully,

David Lewis
Executive Director
Corruption Watch
[Unsigned due to electronic transmission]