



Submissions by Corruption Watch: Commission of Inquiry into Tax Administration and Governance by South African Revenue Services

Introduction

1. Corruption Watch (“CW”) is a non-profit civil society organisation. It is independent, and it has no political or business alignment. Corruption Watch intends to ensure that custodians of public resources act responsibly to advance the interests of the public. Its ultimate objectives include fighting the rising tide of corruption, the abuse of public funds in South Africa, and promoting transparency and accountability to protect the beneficiaries of public goods and services.
2. CW has a vision of a corruption free South Africa, one in which informed citizens are able to recognise and report corruption without fear, in which incidents of corruption and maladministration are addressed without favour or prejudice, and importantly where public and private individuals are held accountable for the abuse of public power and resources.
3. As an accredited Transparency International Chapter in South Africa, core to our mandate is the promotion of transparency and accountability within the private sector and state institutions aimed at ensuring that corruption is addressed and reduced through the promotion and protection of democracy, rule of law and good governance.
4. CW seeks to expose corruption and 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. Accordingly, as part of our mandate, we are committed to strengthening the criminal justice system, including efforts to address financial crime; 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.
5. CW welcomes the opportunity to make written submissions to the Commission of Inquiry into Tax Administration and Governance by the South African Revenue Services (“**the Commission**”), in relation to the Commissions specific Terms of Reference.

Background

6. The South African Revenue Service (“SARS”) is established in terms of section 2 of the South African Revenue Service Act (“the Act”)¹ as an organ of state within the public administration, but as an institution outside the public service. It is therefore required to perform its functions in accordance with the values and principles set out in section 195 of the Constitution which *inter alia* requires public administration to be accountable. As a schedule 3A entity in terms of the Public Finance Management Act (“PFMA”),² the Commissioner of SARS, as its CEO and accounting authority, is also required to comply with the PFMA.
7. The importance of good governance and proper administration of SARS in the fight against corruption, fraud, money laundering and other illicit financial flows cannot be overstated. SARS plays an important role not only in revenue collection but as a member of the Multi-Agency Working Group³ and the Anti-Corruption Task Team, with its role including the prevention and combatting of fraud and corruption in government and the private sector. SARS has a significant role to play in the furtherance of a number of pieces of anti-corruption legislation such as the Financial Intelligence Centre Act (“FICA”),⁴ the Prevention of Organised Crime Act (“POCA”)⁵ and the Prevention and Combatting of Corrupt Activities Act (“PRECCA”).⁶
8. However, just as SARS and tax authorities around the world are integral in the fight against corruption, so are they susceptible to being corrupted. In 2017, Transparency International’s Global Corruption Barometer⁷ found that globally, an average of 32% of people perceived tax officials as being the most corrupt individuals in society.
9. A report commissioned by the German Federal Ministry for Economic Co-operation and Developments found that “*barely any area of administration is as susceptible to corruption as public finance,*” and that “*international observational studies suggest that well over 50% of acts of corruption in the public sector occur in public finance.*” It found further that:

¹ 34 of 1997

² 1 of 1999

³ <http://www.treasury.gov.za/publications/annual%20reports/national%20treasury/nt%20annual%20report%202009-10.pdf>

⁴ 38 of 2001

⁵ 121 of 1998

⁶ 12 of 2004

⁷ See https://www.transparency.org/news/feature/global_corruption_barometer_citizens_voices_from_around_the_world

⁸ Preventing Corruption in Public Finance Management, A Practical Guide, at p 7 – 8 (2005)

See <http://siteresources.worldbank.org/EXTFINANCIALMGMT/Resources/313217-1196229169083/4441154-1196275288288/4444688-1196378010797/PreventingCorruptioninPublicFinanceManagement.pdf>

“the causes of this particularly high susceptibility to corruption in the public finance sector are on the one hand the unusually large benefits that corrupt individuals or enterprises are able to obtain. For instance, they can obtain both direct and indirect financial benefits (e.g. by evading or reducing tax payments, or by receiving inappropriate tax breaks), and they can profit indirectly by obtaining competitive advantages over domestic and foreign competitors (as for instance in the case of non-tariff trade barriers or shortened customs clearance times). On the other hand, the strong demand leads to a high degree of receptiveness among public officials, who further increase the opportunities for corruption by introducing special practices – e.g. by creating complex and poorly transparent tax systems and procedures.”

10. The susceptibility of tax authorities is therefore linked to both the immense benefits which can be derived from corrupt individuals as well as the immense scope for abuse of power. A report by the U4 Anti-Corruption Resource Centre⁹ found that

“Few public agencies are as powerful and as interwoven with society as the revenue administration, which monitors and appraises the economic activities of a country’s citizens and businesses. Tax administrations often have important financial information about the economic operations of these actors, making it possible to extract high political dividends by controlling the tax administration. Politicians can, for example, intervene in tax administration to grant favours such as tax exemptions to supporters, or to harass political opponents through audits. Moreover, tax administrations are attractive targets for political interference in personnel matters, because the authority offers both relatively well-paid jobs and considerable rent-seeking opportunities.”

11. With this in mind, CW has viewed the maladministration and lack of good governance at SARS in a very serious light, and welcomes this opportunity to make submissions on important anti-corruption issues.
12. We have since 2016, been particularly focused on the conduct of the Commissioner and CEO of SARS, Mr Tom Moyane ("Moyane"), in relation to a report of the FIC detailing allegations of suspicious transactions in respect of two SARS employees. We became concerned with this matter when we perceived that very little action was being taken by Moyane in order to hold the employees accountable and to ensure that requisite disciplinary and criminal action was taken against them. The details of this matter, a description of the role of various actors as well as the steps which we have taken in order to obtain accountability, is set out below, followed by recommendations which may be useful to the commission.

⁹ Odd-Helge Fjeldstad (2005): Revenue Administration and Corruption at p. 11 U4 Issue 2:2005. Chr. Michelsen Institute. See <https://www.cmi.no/publications/file/2039-corruption-in-revenue-administration.pdf>

History of matter

13. On 17 May 2016, Moyane received a report from the FIC detailing suspicious transactions involving Mr Mashudu Jonas Makwakwa ("Makwakwa") and Ms Kelly Ann Elskie ("Elskie"), both SARS employees.¹⁰
14. The report described a total of 75 suspicious transactions done between 1 March 2010 and the 31 January 2016 by Makwakwa and Elskie, R785 130.00 linked to Makwakwa and R450 200.00 linked to Elskie. It alleged that Makwakwa and Elskie committed crimes in terms of PRECCA, FICA and POCA.
15. We submit that these matters were never reported to the Directorate of Priority Crime Investigation ("DPCI") in order to enable further investigation. This is discussed further below under the heading, criminal investigations.
16. Moyane instructed law firm, Hogan Lovells to investigate the allegations against Makwakwa and Elskie. Makwakwa was suspended on 15 September 2016 pending the outcome of the investigation and disciplinary proceedings. Ms Elskie was later suspended on 10 October 2016.
17. On 29 September 2016, Hogan Lovells wrote a letter to SARS regarding the investigation.¹¹ The letter sets out the scope of their investigation.
18. In response to question posed by Democratic Alliance MP, Mr D Maynier to the Minister of Finance on 12 October 2016 (NW1894), SARS stated that:¹²

*The report was not referred to further investigation at that stage. SARS had adopted a two-pronged approach towards handling this matter. The first part entailed affording Mr Jonas Mashudu Makwakwa and Ms Kelly-Ann Elskie an opportunity to respond in writing to the allegations against them. **This was part of the internal investigative process that SARS undertook.** The second part involved engaging the ("FIC") for*

¹⁰ A copy of the FIC report is attached as Annexure "A1"

¹¹ https://www.scribd.com/document/365000071/160929-Hogan-Lovells-Legal-OpinionMakwakwa#download&from_embed

¹² Question NW1894 to the Minister of Finance: Whether the SA Revenue Service received a report concerning alleged suspicious and unusual payments to a certain person (Jonas Makwakwa). If not, why not. If so, (a) which organ of state produced the specified report; and (b) when was the specified report received; 2) whether the specified report was referred for further investigation; if not, why not; if so (a) when was the specified report referred for further investigation and (b) to which organ of state was the specified report referred to; 3) whether the specified person was suspended; if not, why not; if so (a) when was he suspended and (b) why was he suspended; 4) whether he will make a statement on the matter. See <https://pmg.org.za/committee-question/3869/>

purposes of seeking technical guidance, co-operation and assistance in relation to this matter, as per Section 4 of the FICA.

(a) SARS has appointed the law firm; Hogan Lovells to investigate this matter, and to conduct disciplinary proceedings against the two employees on behalf of SARS. The matter was referred to Hogan Lovells on 15 September 2016.

(b) SARS is aware, based on correspondence received from Directorate of Priority Crime Investigation (“DPCI”) dated 15 September 2016, that the matter has been reported to the (“DPCI”)...

3(b) Mr Makwakwa has been suspended... Mr Makwakwa has been suspended pending the investigation into the allegations contained in the report referred to above.”

19. On 25 October 2016, CW informed Moyane of its intention to lodge criminal proceedings against Makwakwa and Elskie. We indicated the following in order to afford Moyane an opportunity to respond: ¹³

19.1 That it is public knowledge that he informed Makwakwa and Elskie of the content of the FIC report in order to seek their comment and response to the report. We drew his attention to section 29(4) of FICA which prohibits the disclosure of suspicious and unusual transaction to certain persons, specifically those implicated in such reports. Section 53 of FICA renders the unauthorized disclosure of such information an offence and one which carries a fine of R10 000 000 and imprisonment for a period not exceeding 15 years.

19.2 That as CEO and Commissioner of SARS, he was well aware of the duty to report knowledge or suspicion of corrupt transactions over R100 000 to the DPCI for investigation in terms of section 34 of PRECCA. That he would also be aware of the fact that it is an offence to not report such transactions, which offence may carry a fine or imprisonment not exceeding 10 years. We indicated we regarded his failure to report the matter to the DPCI as being in breach of Section 34 of PRECCA.

20. Responding to the above, Moyane made the following statements in a letter dated 27 October 2016:¹⁴

20.1 that he is aware of his legal obligation to refer this matter to the South African Police Services ("SAPS"), however, that he had been advised by the DPCI that the matter had been already referred to SAPS for criminal investigation into corruption, racketeering and money laundering;

¹³ The letter from CW to Moyne, copying former Minister of Finance, Mr Pravin Gordhan is attached marked “A”

¹⁴ Annexure “B”

- 20.2 that he denies the allegation that he is in breach of section 34 of PRECCA;
- 20.3 that he has instructed his Human Resource Department to investigate the allegations surrounding Kelly's promotion and academic qualifications;
- 20.4 that on 23 May 2016 he informed Makwakwa and Elskie about the allegations in the report and that he intends to conduct an investigation as directed by the FIC;
- 20.5 that he took a two-pronged approach in dealing with the matter entailing giving Makwakwa and Elskie the opportunity to respond in writing to the allegations made in the report and engaging the FIC for the purposes of seeking guidance, cooperation and assistance in accordance with section 4 of the FICA;
- 20.6 that the decision to institute the misconduct investigation was part of the execution of his responsibility to maintain discipline in terms of section 9 (2) of the SARS Act of 1997;
- 20.7 that in terms of section 84 of the Public Finance Management Act he is obligated to investigate allegations of financial misconduct;
- 20.8 that in disclosing the report to Makwakwa and Elskie he acted in accordance with the provisions of section 29(4) of FICA; and
- 20.9 that his actions do not amount to a breach of section 53 of FICA.
21. CW wrote a letter dated 31 October 2016,¹⁵ to the Director of FIC requesting that FIC indicate whether it regards the disclosure of the report as an authorised disclosure in terms of section 29(4) of the FICA.
22. On 6 November 2016,¹⁶ FIC responded to the above letter stating the following;
- 22.1 that FIC does not give legal advice or opinion on the interpretation of FICA in instances where the FIC may be a party to the merits of the matter;
- 22.2 that FIC has provided an extensive reply to the Minister of Finance and Parliament;
- 22.3 that any referral of financial intelligence to a law enforcement agency or other entity prescribed by the FICA, places a responsibility on the agency to conduct an investigation in line with that agency's national investigative mandate. The FIC indicates the nature of matters that may be investigated; it does not instruct agencies to investigate any particular matter. Consequently, SARS is required to investigate in terms of the SARS Act, the PFMA and the Tax Administration Act 28 of 2011.

¹⁵ Annexure "C"

¹⁶ Annexure "E"

23. CW wrote a letter to the head of the DPCI on 31 October 2016,¹⁷ questioning the contradictory statements which were being made by SARS and the DPCI on the issue of whether or not the matter was reported by Moyane to the DPCI. More detail on these contradictory statements appear in paragraph 49 below. CW also requested the DPCI to indicate whether they had absolved Moyane from his statutory duty to report the allegations against the two employees in terms of section 34 of PRECCA, as it appeared from Moyane's letter to us, that he believed that he was absolved from such statutory duty. We also requested written correspondence to support the claims made by Moyane as well as information on the nature and status of any investigation against the two employees. The DPCI did not respond to our correspondence.
24. On 25 November 2016, CW wrote to SARS in respect of the response from FIC as well as the contradictory statements made by the DPCI and SARS on the nature and status of the criminal investigation.¹⁸ Having received no further response from SARS or the DPCI on the nature and status of the investigation, CW proceeded to lodge criminal charges against Makwakwa¹⁹ and Elskie²⁰ on the basis of the FIC report and against Moyane²¹ for failing to report the matter to the DPCI in terms of section 34 of PRECCA as well as for providing the FIC report to Makwakwa and Elskie in criminal breach of sections 29(4) and 60(2) of FICA.
25. CW addressed a letter to the head of the DPCI on 30 January 2017, to follow up on the investigation and reminding the DPCI, as a unit within the police, of their duties to investigate priority crimes and keep complainants informed of the status of investigations.²² On 21 February 2017, subsequent to a meeting CW had with Brigadier R M Makinyane on 8 February 2017, CW followed up with Brigadier Makinyane on the status of the investigations but received no response.²³
26. On 29 March 2017, we reported the inaction of the DPCI to IPID and requested IPID to investigate the failure of the DPCI to act on these priority crime matters.²⁴ We did not receive a response.
27. On 30 October 2017, having received no further information on the investigation and there being no developments in the matter, CW wrote a further letter to the head of the DPCI requesting an update on the investigations and received no response.²⁵ CW also addressed a letter on the same day to the National Director of Public Prosecutions on the status of any

¹⁷ Annexure "D"

¹⁸ Annexure "D1"

¹⁹ "Annexure "G"

²⁰ Annexure "H"

²¹ Annexure "F"

²² Annexure "H1"

²³ Annexure "I"

²⁴ Annexure "I2"

²⁵ Annexure "J"

prosecution in the matters²⁶ and to SARS to request information on the internal investigations.²⁷

28. On 2 November 2017, and after being informed by media reports that Makwakwa and Elskie had been reinstated and back at work, CW wrote to SARS to request information on their reinstatement and the basis of Moyane's decision. In this regard, CW requested information on the terms of reference for the Hogan Lovell's investigation and the reasons for pursuing an internal investigation and disciplinary proceedings despite there being ongoing criminal investigations.²⁸ CW also wrote to the Chairperson of the Standing Committee on Finance to request information on the Committee's oversight in respect of this matter.²⁹
29. In a statement by Hogan Lovells' on 4 December 2017³⁰ it was stated:
- 29.1 That the scope of the investigation conducted by them was limited to investigating whether Makwakwa and Elskie had contravened any internal policies and/or the PFMA when effecting certain payments and whether certain ad hoc payments to Makwakwa by SARS were irregular.
- 29.2 They did not seek to directly investigate the financial transactions identified by the FIC and they understood that all criminal related allegations arising from the FIC report were referred to the relevant authorities for investigation.
- 29.3 That SARS accepted their advice in relation to their narrow investigation and charged Makwakwa for contravening his suspension condition and failure to disclose an external business interest. A hearing was convened and chaired by an independent senior counsel, Advocate Terry Motau SC. The findings of that internal enquiry, delivered to Hogan Lovell's on 13 October 2017, acquitted Makwakwa of both charges.
- 29.4 That the Motau SC findings did not exonerate Makwakwa from possible charges which could result from the outcome of the investigation into his tax affairs (being investigated by PWC) as well as the criminal investigation (being conducted by the Hawks) and that to their knowledge, those investigations continue.
30. On 14 December 2017, CW received a letter from Colonel Magobosha from the DPCI to say that the investigation into Moyane's alleged contravention of section 34 of PRECCA was investigated and referred to the specialised commercial crimes unit of the NPA for a

²⁶ Annexure "K"

²⁷ Annexure "L"

²⁸ Annexure "L2"

²⁹ Annexure "M"

³⁰ See https://www.hoganlovells.com/~/_media/hogan-lovells/pdf/inbilib014471384v1laverymodisehoganlovellsstatement02122017lwdlib02.pdf?la=en

decision and that the NPA had declined to prosecute.³¹ No mention is made of any investigation into the alleged contraventions of FICA.

31. On 25 January 2018, CW again wrote to the Standing Committee on Finance to find out about their oversight in respect of the matter.³² An official response from Parliament was received on 7 February 2018.³³ In the response, it appears that the key challenge facing the Committee was whether the confidential FIC report could be accessed by the Committee and legal advice was being sought about such access.
32. Also on 25 January 2018, CW sent a letter to the NDPP requesting reasons for the NPA declining to prosecute Moyane as well for a certificate *nolle prosequi* to be issued.³⁴ No response was received.
33. We subsequently referred the matter to our attorney, Mr Moray Hathorn of Webber Wentzel. On 23 March 2018, he wrote to the Hawks, indicating that fifteen months had passed since criminal charges were lodged by CW and requesting a written report on the progress and status of the investigations.³⁵
34. On 27 March 2018, Brigadier Makinyane responded³⁶ to Mr Hathorn and indicated that “the allegations for contravention of section 34 of PRECCA and allegations for contravention of section 29(4), 60(1) and 60(2) of FICA against Commissioner Moyane were both investigated under Brooklyn CAS 222/12/2016 which was declined by the Prosecutor. It was further indicated that the cases against Makwakwa and Elskie were still under investigation, that there was ongoing consultation with the prosecutor but that more evidence needed to be obtained.
35. On 29 March 2018, our attorney wrote³⁷ to the NPA and requested that a certificate of *nolle prosequi* in respect of the charges laid against Moyane, under PRECCA and FICA be issued within 2 weeks. He also requested full details of the progress of the matters against Makwakwa and Elskie.
36. Adv. Mokgathe responded³⁸ on 2 May 2018 to say that the investigations against Makwakwa and Elskie were continuing and that CW was not entitled to the details of the investigation being carried out. In respect of Moyane, Adv. Mokgathe indicated that the prosecutor’s decision on Moyane’s investigation was being reviewed and that “*additional affidavits were being obtained from all role players, to confirm or deny if Mr Moyane did*

³¹ Annexure “N”

³² Annexure “O”

³³ Annexure “O2”

³⁴ Annexure “P”.

³⁵ Annexure “Q”

³⁶ Annexure “R”

³⁷ Annexure “S”

³⁸ Annexure “T”

report as required by section 34 of PRECCA and whether proper procedure was followed subsequent to that reporting or failure thereof.” No mention is made of any further investigation on the FICA charges. No further correspondence has been forthcoming.

Analysis and Recommendations

Criminal Charges against Makwakwa and Elskie

37. In December 2016, CW charged Makwakwa and Elskie in respect of FICA offences as per the allegations of corruption which emerged from the FIC report. More than a year and a half later, the investigations against Makwakwa and Elskie are not yet complete and no further information is being made available to CW, in spite of being the complainant in the matter.
38. Firstly, it was the responsibility of SARS and not CW to officially charge the two employees for offences raised in the FIC report. This is however dealt with under the section on Moyane’s criminal conduct.
39. The lack of immediate and visible accountability in respect of Makwakwa and Elskie has serious repercussions on the good governance of SARS as well as the deterrence of corrupt activity, both inside and outside the organisation. Detection of corruption involving SARS employees and punishment of such employees is essential to ensuring that such conduct is deterred. As Fjeldstad observes³⁹ the likelihood of detection and punishment is a significant factor in addressing corruption, and that, *“in addition to wage incentives, tax collector’s decision on whether to behave in an honest or corrupt manner depends on the anticipated costs of the decision...at least two variables matter: the probability of being detected and the size of the penalty.”*
40. With reference to the preamble of the Terms of Reference for the commission, in order to ensure that the public has *“confidence that SARS is managed to the highest standard of ethics, integrity and efficiency,”* it is of utmost importance that allegations against SARS officials, particularly senior SARS officials are dealt with speedily and transparently. Criminal justice authorities responsible for investigation and prosecution must prioritise allegations and ensure that the public is informed of the progress of matters. In the absence of speedy and conclusive investigations and/or prosecutions as well as regular information being made available to the media, civil society and the general public, SARS is at risk of being regarded as vulnerable to corruption and as seeking compliance only insofar as taxpayer compliance is concerned. These create the ideal conditions for general apathy and a loss of taxpayer confidence.

³⁹ See fn 9 at p.10

41. In addition to ensuring that criminal sanctions against tax officials are prioritised and publicised, we suggest that issues around the incentivisation for good conduct, integrity codes and other more positive methods for co-ercing good conduct be introduced, if not already in place at SARS. The UN Guidelines for Effective Financial Management⁴⁰ may be useful to the Commission insofar as it deals with revenue administration and good governance.

The Role of Hogan Lovell's

42. The role of Hogan Lovell's, the manner in which it has been involved in the matters raised herein and the impact of such involvement on good governance and accountability at SARS needs to be considered carefully by the Commission.
43. Ultimately, the report of Hogan Lovell's was relied on in order to reinstate Makwakwa and to rebuff questions around the outcome of investigations and the implementation of sanctions. Hogan Lovell's would have been aware, from prominent and extensive media reports, that Moyane had relied on his referral of the matters to Hogan Lovell's to justify a non-referral to criminal justice authorities. They should have alerted both parliament and the Minister to the fact that they were not carrying out an investigation into the FIC allegations, at a much earlier stage, and when they realised that these misleading claims were being made by SARS, certainly they should have done so before they were compelled to do so by Parliament in December 2017.
44. There is also a broader question of law firms and consultants (in this case PWC) being appointed to conduct internal investigations and later claim legal privilege when questioned by Parliament and in circumstances where they are conducting investigations for their own client. It appears that the "investigative reports" produced by law firms are not legal advice in contemplation of litigation but findings which are quasi-judgmental and intended to influence public opinion. In the circumstances, legal privilege should not attach to the reports. These "investigative reports" do not comprise legal advice to a client and have a direct impact on matters in the public interest. Any claim made by SARS, Moyane and Hogan Lovell's around legal privilege preventing the public release of reports should therefore be rejected.
45. Should firms accept briefs in these circumstances and would they not be conflicted in doing so? Should SARS continue the practice of instructing existing legal advisors to "investigate" matters arising from allegations which are criminal in nature? We raise these

⁴⁰ UN Guidelines, Economic Governance: Guidelines for Effective Financial Management at p. 13 (2000) See https://publicadministration.un.org/publications/content/PDFs/E-Library%20Archives/2000%20Economic%20Governance_Guidelines%20for%20Effective%20Financial%20Management.pdf

important issues as questions for the Commission to consider and perhaps invite additional submissions from legal professional bodies and other interested and affected parties so that the issues may be considered more carefully.

46. We submit that Hogan Lovell's should not have accepted an instruction from their own client in circumstances where they would have had an existing relationship with Moyane, and possibly Makwakwa and Elskie, and where they are not forensic auditors or investigators, but a firm offering legal advice, thus enabling them to claim legal privilege in the face of reasonable public interest demands for accountability from a public agency
47. With due regard for clause 1.10 of the terms of reference and although we have no concrete information⁴¹ which points to whether any SARS official in utilising the services of a legal firm, attempted to influence the outcome of any report following services so rendered; we submit that further evidence be sought on whether such influence affected the outcome of the Hogan Lovell's report on this matter as well as their handling of the matter. We note that in the infamous 'rogue unit' investigation conducted by KPMG, Moyane is widely construed to have influenced the outcome of the investigation.

Moyane's conduct

48. Moyane was the CEO and Commissioner for SARS as well as its accounting authority. Section 9 of the Act set out his responsibilities which in terms of section 9(2)(a)-(c) included the formation and development of an efficient administration, the organisation and control of the staff and the maintenance of discipline. Section 9(3)(d) required him to properly and diligently implement the PFMA, which included adherence to fiduciary duties and responsibilities in sections 50 and 51 of the PFMA.

Contradictory statements

49. It is clear from Moyane's response in Annexure "B", in October 2016 that he did not report the matter to the Hawks because he believed that there was already an ongoing investigation. However, spokesperson for the Hawks said, also in October 2016, that the Hawks were not investigating the matter. An extract of an article written by Marianne Thamm in the Daily Maverick on 13 October reads as follows:

⁴¹ We submit that the inference from a number of public statements, particularly those by Lord Peter Hain in respect of Hogan Lovell's indicated a "whitewashing of issues" and Hogan Lovell's being influenced in some manner in order to "cover up serious criminal behaviour". We do not however have concrete information on any influence over Hogan Lovell's or other reasons for their conduct. See <https://www.dailymaverick.co.za/article/2018-05-21-hain-calls-for-penalties-for-uk-companies-aiding-money-laundering-for-sa-criminals/>

“...while both Commissioner Moyane as well as the Hawks, through its spokesperson have denied that the matter has been reported to the Directorate for Priority Crime Investigation (Daily Maverick has twice asked the Hawks), the SARS reply seems to indicate otherwise.

SARS is aware, based on correspondence received from the DPCI dated 15 September 2016 that the matter has been referred to the DPCI.

Daily Maverick is in possession of a docket number, CAS 3/6/2016 which purportedly relates to the Makwakwa investigation and which we learnt was being handled by Colonel Herbert Heap.

Brigadier Hangwani Mulaudzi, Hawks spokesperson responded to our question this week saying, “there is no case and Colonel Herbert Heap is not the investigative officer. We still maintain our previous stance. [That it is a SARS internal matter]⁴².”

50. We would regard these contradictory statements in the public domain as being pertinent to clause 1.8 of the terms of reference⁴³ as these facts illustrate direct contradictions between the Commissioner of SARS and the Hawks. The relevant role players should be requested to explain and account for these contradictions.

Criminal Charges

51. We lodged criminal charges against Moyane for alleged breaches of section 34 of PRECCA, in respect of failing to report the matters involving Makwakwa and Elskie to the Hawks, as well as breaches of FICA in respect of his unlawful disclosure of the FIC report to the two employees.
52. It appears from the latest response of the NPA, attached as Annexure “T”, that the investigation is proceeding only in respect of the breaches of PRECCA. This letter refers to additional information being sought by the NPA, to confirm or deny whether Moyane did report the corruption involving Makwakwa and Elskie and whether proper procedure was followed.

⁴² Marianne Thamm ‘Analysis: SARS Makwakwa Probe- are we heading for a costly, discredited investigation’ available at <https://www.dailymaverick.co.za/article/2016-09-20-analysis-sars-makwakwa-probe-are-we-heading-for-another-costly-discredited-investigation/> last accessed on 27 July 2018.

⁴³ Clause 1.18 of the Terms of Reference states that the Commission must enquire into, make findings, report on and make recommendations on whether any media statement issued by SARS, or any similar statement or comment issued by any SARS official, whether in his or her official capacity or not, during the period September until March 2018, brought SARS into disrepute and/or contradicted the official position of the South African Government.

53. It is unclear as why only the charges in respect of the alleged breach of PRECCA is being pursued but we regard the pursuit of all charges as being integral to ensuring accountability and good governance at SARS.
54. With due regard for clause 1.1.6 of the Terms of reference,⁴⁴ we submit that Moyane failed to take adequate and legal steps in ensuring that PRECCA and FICA and other applicable legislation were fully adhered to in respect of information that was provided by the FIC.
55. We submit further that Moyane's actions in providing misleading information to CW and indeed to the Portfolio Committee around the nature and extent of the investigation being carried out by Hogan Lovell's was a significant breach of fiduciary duty and that clauses 1.1.4, 1.1.7, 1.5, 1.8 and 1.15 are relevant in respect to this submission. We submit that the current legislative framework addresses issues of accountability by imposing criminal sanctions for non-compliance and breaches of legislative provisions, however sanctions and accountability need to be strengthened.
56. We submit that Moyane's conduct amounted to breaches of the Act, the PFMA, PRECCA and FICA and submit further that in order to ensure the combatting and deterrence of corruption and the promotion of good governance at SARS, the Commission should:
- 56.1 Enquire into the status of the criminal charges we lodged against him and request the relevant criminal justice authorities to make submissions on the length of delays; and whether the investigation and any prosecutions are being prioritised;
- 56.2 Enquire from the NPA, why an initial decision not to prosecute Moyane as communicated on 27 March 2018 in Annexure "R" was changed, placing the decision as to whether or not to prosecute, under review;
- 56.3 Consider our submissions on Moyane's conduct and if such conduct is considered to amount to breaches of fiduciary duty, the Commission should recommend that SARS charge Moyane for breaches of his fiduciary duty. This would serve as deterrence of maladministration and unlawful conduct, not only in respect of tax administration but for all accounting authorities.

Reinstatement of Makwakwa

57. In October 2017, CW was informed that Makwakwa had been reinstated and allowed to return to work. He later resigned in March 2018.⁴⁵
58. We submit that Moyane should not have allowed Makwakwa to return to at SARS while criminal charges were still pending against him. Mr Moyane placed SARS in a vulnerable

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⁴⁵ <http://www.sars.gov.za/Media/MediaReleases/Pages/14-March-2018---Resignation-of-Mr-Jonas-Mashudu-Makwakwa.aspx>

position potentially undermining the financial management and internal control systems for which he was responsible. As Chief Officer for Business and Individual Taxes (“BAIT”) at SARS, he wielded an immense amount of power, ultimately making him susceptible to the fraud and corruption which is alleged to have occurred in light of the suspicious transactions highlighted in the FIC report.

59. Re-instating a senior official of SARS who is at the centre of allegations relating to corrupt activities and money laundering has the potential of undermining taxpayer morality, which from the reading of the preamble of the terms of reference the Commission seeks to inquire into and make recommendations. It is essential that individuals appointed to senior positions at SARS are individuals of integrity and ethics to guard the interests of the SARS, the State and the public. These issues fall within the ambit of provisions 1.15 and 1.18 of the terms of reference and the relevant role-players should be requested to provide further information and account for their actions.

General recommendations

60. A key recommendation which the Commission should consider, emanates from the Davis Tax Committee report on Tax Administration,⁴⁶ which deals with the appointment of the SARS commissioner. The report details how the SARS Act was changed from having the Minister of Finance appoint the SARS commissioner to the President being responsible for such appointment. The report presents a number of different alternative proposals and states that, *“all are fashioned to promote the constitutional values of accountability and transparency which, in turn, ensures a governance structure that promotes the core mandate of SARS. The Committee offers these to the Minister as viable alternatives to enhance good governance in SARS and to accord with the essence of the Katz Commission’s proposals for an independent SARS which we consider to remain applicable.”* Alternatives offered include followed a process similar to the one for the appointment of the Public Protector or reverting to the appointment being made by the Minister of Finance.
61. The other key recommendation which is made in this report relates to the appointment of a Board of directors for SARS. In paragraph 40, it is stated that:

“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

⁴⁶ <http://www.taxcom.org.za/docs/20171113%20Tax%20Admin%20Report%20-%20on%20website.pdf>

Minister with due regard to representativity, 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.”

62. Urgent clarification is required as to the confidentiality extended information regarding the tax affairs of an individual taxpayer, when such access is required in pursuit of a potential criminal investigation and/or disciplinary inquiry.
63. We support both of the above recommendations and in light of the mandate of the Commission to its focus on governance, urge this Commission to make firm recommendations on the way forward on these issues.

Conclusion

64. We appreciate the opportunity to make submissions to the Commission and hope that they are useful. We will be available to make oral submissions if required.

**Submitted by Corruption Watch
Leanne Govindsamy and Michelle Sithole
31 July 2018**