

**COMMISSION OF INQUIRY INTO TAX
ADMINISTRATION AND GOVERNANCE BY SARS**

FINAL REPORT

MR PRESIDENT

HEREWITH THE FINAL REPORT OF THE COMMISSION OF INQUIRY.

A handwritten signature in black ink, appearing to read 'R Nugent', with a stylized flourish at the end.

JUDGE R NUGENT

COMMISSIONER

DATE:

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**THE TERMS OF REFERENCE
and the
COMMISSION'S PRIMARY CONCLUSIONS**

[1] The former Minister of Finance, Mr Gigaba, who first decided a commission of inquiry should be established in connection with SARS, gave evidence before the Commission. He said he had formed the view that an inquiry was required because the integrity of SARS was being questioned, domestically and abroad. He concluded that a process was needed to look into the affairs of SARS, from which recommendations could emerge addressing issues of governance and integrity that were of concern to investors, the rating agencies, the international financial institutions, and the taxpaying public.

[2] The preamble to the terms of reference (**Appendix 1**) affirms that purpose when it records that 'reports in the public domain that potentially undermine taxpayer morality need to be assessed for their veracity, and possible corrective measures need to be implemented to maintain taxpayer morality and confidence' and that 'the public must have confidence that SARS is managed to the highest standard of ethics, integrity and efficiency'.

[3] The extensive terms of reference identify events that have been reported in the public domain that potentially have that effect. If those events have indeed occurred, they are manifestations of the erosion of integrity and governance at SARS. But inquiry into whether there are manifestations of a disease is only the entry point to diagnosing the disease. Once it has been diagnosed then in how many ways it has manifested itself becomes secondary.

[4] The conclusion we reach at the end of this inquiry is that there has been a massive failure of integrity and governance at SARS, and all else follows from that. What SARS was, and what it has become, is sufficient proof in itself that integrity and governance failed on a massive scale.

[5] I reported in my interim report that that was brought about by at least reckless mismanagement on the part of Mr Moyane. We have heard much evidence since then. What has become clear is that what occurred at SARS was inevitable the moment Mr Moyane set foot in SARS. He arrived without integrity and then dismantled the elements of governance one by one. This was more than mere mismanagement. It was seizing control of SARS as if it was his to have.

[6] There are many elements to good governance. Principally, in any organisation, it is the oversight role of senior management structures, that are able to put a brake on abuse of authority, but senior management was driven out or marginalised at SARS, and we have seen no evidence that senior management appointed by Mr Moyane was anything but compliant. In a tax collecting agency, oversight at every step in the tax collecting process is also vital, but the development of its sophisticated information technology, which has inbuilt checks, was summarily stopped, and the organisational structure of SARS, that provided oversight, was pulled apart. Dissent was stamped out by instilling distrust and fear. Accountability to other state authorities was defied. Capacity for investigating corruption was disabled. On the eve of his suspension Mr Moyane was about to dismantle governance over the settlement of major tax disputes.

[7] To report on each question posed by the extensive terms of reference in isolation would trivialise what has happened at SARS. I have reported instead in broader terms on what happened at SARS over the period under inquiry. Within that will be found as many answers to the questions posed by the terms of reference as we have found. But when integrity and governance has failed, as happened at SARS, it has probably manifested itself in many ways that are yet to be found.

[8] The hallmark of good governance in an institution is the existence of a culture of healthy dissent. Mr Moyane substituted instead a culture of fear and intimidation. What is most needed, and what is being looked for by employees at SARS, is an end to its present debilitating uncertainty, through a new Commissioner with integrity and managerial capacity, to restore that culture of healthy dissent.

CHAPTER 1: INTRODUCTION

THE ESTABLISHMENT OF THE COMMISSION

[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. Where the findings in this report are founded on evidence given at public hearings, which they attended, I use the plural, but some findings are founded on documents alone, to which they did not all have insight, in which cases I use the singular. Their knowledge and sound guidance and advice has been invaluable.

[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.

[3] Premises leased by SARS, but separate from its own operational premises, were made available to us by the acting Commissioner at 2nd Floor Hilton House, Brooklyn Bridge, 570 Fehrsen Street, Pretoria. The Acting Commissioner also made available to the Commission the assistance of two senior legal officials, Dr Giorgio Radesich and Mr Wayne Broughton, to liaise between the Commission and SARS, a staff member to assist in its administration, Ms Beatrix de Villiers, and a staff member with knowledge of its information technology systems, Ms Carol van Wyk. Other personnel have assisted the Commission from time to time and, although not named, have not been overlooked. Ms Nonhlanhla Mkhwebane was seconded by the Department of Justice and Constitutional Development to act as Secretary to the Commission. They portrayed the exemplary dedication to public service we encountered amongst the numerous public officials we

encountered in the course of the inquiry, and the Commission is deeply indebted to them all for their assistance.

[4] The Commission appointed as its counsel, to present and examine evidence, Adv Carol Steinberg, Adv Lunga Siyo and Adv Frances Hobden. The work assigned to them was demanding and pressured, at times they were subjected to invective, but all was weathered with equanimity. Their professionalism in every respect was in the best traditions of the Bar as I knew it.

[5] A website and dedicated e-mail address were established to facilitate communication, at www.inqcomm.co.za and commission@inqcomm.co.za respectively.

THE NATURE OF THE INQUIRY

[6] Misconceptions that arise in relation to various aspects of a commission of inquiry have their source in likening it and its processes to those of a court of law. A commission of inquiry is not an adjudicative body. It is what the language conveys, which is a body conferred with authority to make inquiry, and then to report to the President what its inquiries have shown, and to inquire, in ordinary language, is to 'search into, seek knowledge concerning, investigate, examine'. That means its process is proactively inquisitorial, in which the commission seeks out information for itself, unlike a court in adversarial litigation that is reactive to material others place before it.

[7] That a date is set for a commission to submit its final report, by which is meant its last report, does not mean it must await that date before making any findings or recommendations. It means only that that is the last date by which it must do so. If a commission is satisfied that it has inquired sufficiently to make its findings before that date, then so much the better. Nor must it report its findings and make its recommendations all at once. It is common for a commission of inquiry to submit

interim reports and recommendations on discrete issues as the inquiry proceeds, if that is justified by the inquiries it has made at that point. An interim report, once more as the ordinary language conveys, is no more than a report made between two events, the first being the commencement of the inquiry, and the second being the submission of its last report. Similarly, a recommendation that is made at that point is no more than a recommendation that is made, in time, between those two events. It is no less definitive than if it had been made in the last report.

THE COURSE OF THE INQUIRY

[8] The work of a commission of inquiry does not commence when it holds its first public hearings. Indeed, depending upon the nature of the inquiry, there might not be any public hearings at all. Its work commences as soon as practicable after it has been established. In this case the Commission commenced its work by initiating its inquiries immediately it was appointed.

[9] SARS is a large and complex institution that is bewildering when it is first confronted. What was required at the outset was to become familiar with the structure and operation of SARS through explanation from those who are familiar with its complexities. I am grateful to those who, at the outset, patiently undertook the unenviable task of instructing me on the structure and operations of SARS.

[10] Interviews were also conducted with employees and former employees who could be expected to have information relevant to the inquiry, relevant documents were identified and scrutinised, institutions referred to in the terms of reference were consulted, and submissions were invited from employees and the public at large. The Commission's inquiries have been directed primarily at operations at the Head Office of SARS, but limited interviews were also held at its branches in Cape Town and Durban.

[11] Submissions were invited from the public and from all 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. Written submissions were received as well from other organisations and individuals.

[12] Submissions were required to be furnished no later than 31 August 2018. Some were furnished after that date but have nonetheless been taken account of in reaching our conclusions. It is not intended in this report to refer expressly to all the written submissions that were received, all of which have been scrutinised, nor to present all the oral evidence that has been heard. What is more informative than the detail of evidence in most cases is the weight of the evidence and on some issues its weight has been overwhelming.

[13] The Commission was required to submit an interim report no later than 30 September 2018. That report was duly submitted. In that report we unanimously recommended to the President, after having afforded Mr Moyane an opportunity to make submissions on the issue, which he spurned, that on the evidence we had received thus far, he should be removed from office, without delay, and be replaced by a new Commissioner of SARS. That was a definitive and final finding, made in the course of the inquiry, on the uncontested evidence we had heard. The evidence we have heard since then has only added weight to the recommendation.

THE EVIDENCE

[14] The regulations governing the conduct of the inquiry, published under Proclamation R18 in Regulation Gazette 10839 of 15 June 2018, allow the Commission to receive evidence in the form of oral evidence, affidavits, and documents alone. In the course of the inquiry many documents were sought from and produced by SARS and in some cases third parties, interviews were conducted with a number of employees of SARS in anticipation of them giving oral evidence or deposing to affidavits, and numerous affidavits and written submissions were received.

[15] The Commission was considerably hampered at the outset by fear amongst employees of SARS of reprisals and victimisation if they were seen to be co-operating with the Commission, which was symptomatic of what has occurred at SARS. A significant number of employees of SARS who were identified as possibly having information relevant to the inquiry were fearful of disclosure, 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 repercussions if the former Commissioner of SARS, who was then under suspension, were again to assume office, or from senior management of SARS. While some such employees were willing to present evidence openly, notwithstanding anxiety on their part, others refused point blank to do so. Written submissions, letters and affidavits from employees were also received either anonymously or under conditions of confidentiality for the same reason. While the Commission has powers of compulsion they were not 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.

[16] Some months into the inquiry there was a noticeable shift in the attitude of employees and the atmosphere in which the inquiry was conducted, with many more coming forward more willingly to proffer evidence. We attribute that to a number of factors. Partly it was an increasing anger amongst employees at the revelations of what was done to SARS and themselves during the period under inquiry. Partly it was an

increasing appreciation that someone was finally listening to what they had to say. Partly it was an increasing awareness that if they wanted things to change they must take the risk of speaking out. And partly it was an increasing confidence that the work of the Commission might indeed bring about change. A palpable shift occurred when the former Commissioner of SARS was removed from office, after which information flowed in readily, making the last month almost as demanding as all the time that had preceded it, which was a manifestation of the fear and anxiety that existed when the inquiry commenced.

[17] We consider the inquiry will be considerably compromised if the Commission is deprived of material information only because those in possession of the information were fearful of disclosing it. In those circumstances the Commission has taken account in reaching its findings of material furnished in confidence, though not anonymously, but has relied on information received in that way only where it is satisfied that there is sufficient verification in one form or another. By and large the findings in this report are founded upon information that was open to scrutiny in the public hearings.

[18] Oral evidence was heard in public from time to time, as and when it was appropriate. Such hearings were held on 26 – 29 June, 21 – 24 August, 29 – 31 August, 25 – 28 September, and 15 – 23 October (excluding the weekend). In the course of those hearings the evidence of 64 witnesses was heard.

[19] The Commission is authorised by the Regulations governing the inquiry to compel the production of documents and affidavits, and to compel appearance before the Commission for the purpose of giving evidence and being examined. The Commission has resorted to exercising that authority sparingly, for two reasons.

[20] The first is that, as I have indicated, evidence given under compulsion is seldom full and frank, and it is usually more fruitful to seek information from those who furnish it voluntarily. Secondly, attempting to extract information under compulsion, where

there is a propensity to conceal the truth, can be ponderous and time-consuming and is usually unproductive in the absence of a factual matrix that has been established in advance. There was voluntary evidence in respect of many of the issues dealt with in this report and access to documents provided a compendious source of information that made the hearing of oral evidence more efficient. Other issues that still warrant inquiry would probably call for greater reliance on compulsion.

[21] Directives to appear before the Commission were nonetheless issued in some cases. In one case the person concerned, Mr Massone of Bain & Co, claimed illness and returned to his home in Italy before the date for his appearance.

[22] In another case an attorney, Mr Maphakela of the firm Mashiane, Moodley & Monama Inc, refused to comply with the directive, albeit that matters the Commission wished to inquire into were matters arising from instructions he had received from SARS, proffering instead affidavits with which he said the Commission should be content.

[23] The Commission is entitled to receive evidence orally, and it is entitled to receive it on affidavit, but it is not for a witness to decide upon the form in which the Commission must receive it. Nor is the Commission obliged to accept what purports to be evidence that is foisted upon it. I attach little weight, if any weight at all, to an affidavit presented by a person who refuses to be questioned on what he or she has said, and his affidavits have been treated accordingly. His unlawful refusal has been referred to the National Director of Public Prosecutions and to the relevant branch of the Law Society.

[24] The Tax Administration Act 28 of 2011 restricts the disclosure of 'taxpayer information', which 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. In various respects the terms of reference require the Commission to inquire into and make

findings on matters concerning taxpayers' affairs. So far as the examination of taxpayers' affairs was required, that examination was conducted by me alone, in some cases accompanied by Adv Steinberg and with the attendance of the acting Commissioner of SARS and one of his colleagues to assist with explanation, and in other cases assisted by other authorised employees of SARS. So far as this report contains information of that nature we consider it prudent that the identity of the taxpayers concerned should not be disclosed in this report, other than in one case in which the identity of the taxpayer company has already been notoriously reported in the media.

[25] I emphasise that absence of proof of a state of affairs is not equivalent to proof of the absence of that state of affairs. Where it is reported that evidence has not been found of a state of affairs it does not signify that the state of affairs does not exist. It signifies only that evidence of that state of affairs has not come to the knowledge of the Commission in the course of the inquiry, but the possibility remains that such evidence might yet come to light. The findings made in this report must accordingly be seen with that in mind.

ABUSE OF THE PROCESS OF THE INQUIRY

[26] No one who asked for the opportunity to give relevant evidence unconditionally was refused that opportunity, and all documents submitted to the Commission were perused. But the inquiry is not a platform for anybody to say whatever they like. It is a place to furnish evidence that is relevant to the inquiry, and no more than that.

[27] Mr Luther Lebelo, Group Executive for Employee Relations at SARS, approached the Commission on more than one occasion, and I afforded him considerable time. He asked to give evidence and it was agreed that he could do so. He said, too, that he wanted to furnish documents to the Commission in support of his evidence, and in due course he delivered documents in five lever arch files to the offices of the Commission. It turned out that the documents had been compiled by Mr Maphakela.

[28] As it turned out, what Mr Lebelo wanted was a platform to ventilate what he says was wrongdoing on the part of Mr Pillay, Mr Richer and Mr van Loggerenberg, which I come to presently, on the pretext of demonstrating that there were grounds for disciplinary steps that were taken against them.

[29] Mr Lebelo duly gave evidence twice at public hearings. Interspersed with that he submitted an affidavit. The common thread through all he said before, and submitted to, the Commission, was his wish to demonstrate that there was evidence that the persons I have mentioned were guilty of the wrongdoing he alleged.

[30] At the outset of his oral evidence he said that by giving evidence he would be compelled to 'continue to do what I hated for the last four years which is to keep on saying these things I am going to say today which does not only hurt the integrity of the people that we are talking about but it hurts also their families and their futures'. He felt compelled to do so, he said, because the alternative was that 'the stigma of being a suspension hit and a purger will continue for the rest of my life'.

[31] Fortunately, we were able to spare Mr Lebelo the pain of hurting those people once again, and of hurting their families. It was not necessary to take up the time of the Commission by reading out aloud what he contended was proof of wrongdoing on the part of the persons concerned, which is what Mr Lebelo had in mind doing. Mr Lebelo was told on more than one occasion that we accept that counsel who drafted the charge sheets against them would not have drafted charges had he not believed, on the material placed before him at the time, that there was a case to meet, which was the ostensible purpose of reading the documents out aloud.

[32] Whether the cases brought against them would have been met is not the concern of this Commission. There are forums for putting people on trial and the Commission is not one of them. Moreover, clearing Mr Lebelo of 'the stigma of being a suspension hit and a purger' is not the purpose of this inquiry. If Mr Lebelo considers he bears such a

stigma it is best he approaches those whom he considers to have attached that stigma and clears it up with them.

[33] That notwithstanding, Mr Lebelo persisted. In response to an invitation from the Commission to furnish submissions on why certain findings affecting him should not be made, he forwarded to the Commission an affidavit of some 135 pages, excluding its voluminous annexures, almost of all which was devoted to airing yet again what he claimed to be proof of wrongdoing on the part of Mr Pillay, Mr Richer and Mr van Loggerenberg, which he appears to have disseminated to a section of the media. He complained as well that an affidavit he had earlier submitted to the Commission had not been placed on the Commission's website.

[34] Certainly his affidavits and his documents have not been placed on the website of the Commission, nor will they be. The website of the Commission was established to facilitate access to evidence that is material to its findings. It is not a medium for disseminating whatever might be dumped at its door. If Mr Lebelo wants to disseminate his material, which is not confidential, he is perfectly free to do so, but the Commission will not disseminate it for him,

[35] The Commission does not accept whatever might be foisted upon it. It has invited anyone to place evidence before it, and has considered everything that has been submitted, but that does not mean everything placed before it is material evidence. It accepts what is material to the inquiry, which Mr Lebelo's documents and affidavits are in large part not, as he was told so many times, and it is for the Commission, not Mr Lebelo, to determine what is material. So far as his affidavits contain relevant material, the relevant parts have been considered and taken account of, but the Commission will not be party to disseminating what is no more than malice.

[36] I might add that Mr Lebelo is not the only one who has sought to use the inquiry as a platform to advance his or her own cause. Others have also walked into the offices

of the Commission with their documents, or imposed them on the Commission electronically, on various subjects they want disseminated to the world, and their material has been treated just the same.

[37] I need also add that early in the inquiry Mr van Loggerenberg submitted a lengthy affidavit dealing with, and exonerating himself of, the allegations that had been made against him. In the same way Mr van Loggerenberg was told the allegations are not material to the inquiry, and he quite properly did not persist.

[38] There is a related matter I ought to dispose of briefly. Mr Lebelo's documents were gathered together by Mr Maphakela, whose firm had represented SARS in the disciplinary proceedings, apparently at a charge to SARS of about R1 million, later reduced to about R750 000. It appears from his invoice that much of his time had been taken up with attempting to 'link' the contents of the documents to alleged transgressions of the persons concerned. In due course Mr Maphakela wrote to Mr Lebelo on 22 August 2018, and sent a copy to me – I am not quite sure why – purporting to prove, from extracts from the documents, the alleged transgressions. Mr Maphakela also said that SARS must be given a 'platform' to provide its 'version of events around 2014, particularly as to what led to the initiation of disciplinary proceedings against Mr Pillay including his suspension.' He said his suspicion that the Commission had decided to 'avoid the allegations' was 'based on the ongoing lobbying [sic] to bring Mr Pillay back into the SARS'.

[39] Mr Maphakela was also invited to furnish submissions on why certain findings should not be made concerning his instructions, particularly on what authority he purported to speak for SARS, and he, too, responded with an affidavit. Amongst other things he said the Commission is not authorised by its terms of reference to make such findings, which is not correct. Nonetheless, it appears from his affidavit that the acting Commissioner has already taken the matter up, and no doubt he will also consider whether Mr Lebelo's conduct is befitting a senior employee of SARS, in which case no findings or recommendations are required.

[40] The acting Commissioner rightly renounced the letter as not representing the views of SARS. We have been told that Mr Lebelo's delegated authority to dismiss employees has also been removed. We are gratified by both. It is time that dignity and decency return to SARS.

Attempts to Resuscitate the 'Rogue Unit'

[41] We have become acutely aware as the inquiry has progressed that the Commission has been sought to be drawn into an onslaught upon those who managed SARS before Mr Moyane arrived, founded upon allegations once peddled by the Sunday Times to a beguiled public for a year and more, about a 'rogue' unit that was alleged to have existed within SARS, which is what Mr Lebelo's documents were all about. An inkling that that was in store appeared soon after the Commission was established and it became increasingly apparent as the inquiry progressed.

[42] The Sunday Times withdrew its allegations and apologised some two years later, but meanwhile, a vast amount of taxpayers' money was splurged by SARS to trawl through documents going as far back as eleven years, in search of evidence of wrongdoing; the allegations were fuelled by leakages of information; and lest the public should be minded to forget, the allegations have been opportunistically repeated, even in an official SARS media release I come to later in this report.

[43] When revenue collection is compromised the consequences are one or more of three. Government programmes must be curtailed, or taxes must be raised, or money must be borrowed, all of which prejudice the country. That is what this Commission is about, and it will not be diverted from inquiring into what is wrong at SARS, and how it can be righted, by attempts to use it for other ends. If there was wrongdoing on the part of those who managed SARS before the period with which we are concerned, then the proper course is for it to be reported to the authorities. The Sunday Times did great

damage to SARS and the people of South Africa and the Commission will not now pick up where it left off.

[44] I think we should not overlook the lesson a former member of the Large Business Centre, Ms Gosai, said should be learnt from what commenced happening at SARS four years ago, for which other evidence provides weighty support:

‘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 RESPONSE TO THE COMMISSION OF THE FORMER COMMISSIONER OF SARS

[45] The former Commissioner of SARS, Mr Tom Moyane, kept away from the Commission from inception, appearing on one occasion only, and then only to disparage and attempt to derail the inquiry, which has continued relentlessly since then. It is clear that Mr Moyane does not have, and never has had, any intention of accounting for what occurred during his tenure at SARS, or of confronting the evidence the Commission has received.

[46] Mr Moyane was pertinently notified each time public hearings were held but neither he nor any representative on his behalf was ever present, except on the occasion I have mentioned. Indeed, on that occasion he protested at evidence being heard in his absence, but then left the hearing before the next witness was called. He was pertinently asked whether he wished to respond to evidence that had been given in public, much of

which was damning of his management of SARS, but he declined. Prior to the submission of the interim report he was afforded the opportunity to make submissions on why it should not be recommended that he be removed from office, which he spurned. Instead he remained in the shadows, defiantly spewing invective at the Commission, through his own mouth and through that of his attorney. His conduct throughout the inquiry fortifies our view that he is and was not fit to be Commissioner of SARS. The correspondence between the Commission and Mr Moyane's attorney in that regard is **Appendix 2**.

[47] Another senior employee of SARS was Mr Jonas Makwakwa, whose name cropped up from time to time in the evidence. He wrote to the Commission saying the truth was not being told, and he wanted to give evidence, but through his attorney he 'demanded' first that a long list of documents be produced. I am not impressed by people who proclaim a wish to have their say, but only conditionally. Mr Makwakwa's attorney was told that his evidence would be welcomed by the Commission, to be presented in the way required by the Commission of all witnesses who gave evidence, but his attorney insisted the Commission first meet her 'demands'. The correspondence between the Commission and Mr Makwakwa's attorney is **Appendix 3**.

THE RESPONSE TO THE COMMISSION OF SENIOR MANAGEMENT

[48] SARS is a large institution. It has about 14 000 employees, spread throughout the country. Its processes and structures are also complex. Such an institution calls for leadership with exceptional managerial experience and skill. SARS is also a prize for those who are bent on corruption. Almost all the revenue of the state passes through its hands and they speak at SARS in millions and billions. It cannot be said too strongly and too often that SARS demands leadership of the highest integrity and character, deeply conscious of their duty to account for their management of SARS.

[49] I said in the Commission's interim report that 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 account for what has occurred, and to right what is wrong. That is not what we have had in this case.

[50] I stressed in my interim report that the replacement of the Commissioner of SARS would not be a panacea, but only the first necessary measure without which there would be no possibility of setting SARS on a course of recovery. I also expressed some concern in the interim report regarding senior management of SARS during Mr Moyane's tenure, who had seemingly sat back complacently while the reputation of SARS was being tarnished and its personnel demoralised.

[51] I also pointed out that early in the inquiry I attended a meeting of the SARS Executive Committee (EXCO), comprising its Chief Officers, where I urged them to engage with the Commission. Not one member of EXCO at the time relevant to this inquiry came forward to acknowledge any responsibility for what occurred at SARS. Some approached the Commission, and then gave evidence, but only to exculpate themselves. It was those lower in the structure who spoke for the organisation and not for themselves.

[52] I and those appointed to assist me have no doubt that our earlier recommendation that the former Commissioner be removed from office was right. One cannot have a Commissioner of SARS who will not answer for his management, but instead hurls insults, to protect his salary to the detriment of the country and of SARS. But a new Commissioner needs as well to ask whether he or she has the quality of senior leadership in support, which he or she will need to restore the integrity and capability of this large and complex organisation that is SARS. That those qualities exist lower down is, in general, quite clear. In the course of the inquiry we have encountered many fine public servants who know their proper role at SARS.

[53] We have found that inquiring into one matter has often exposed yet another that also warrants inquiry. We have recommended in this report that an Inspector-General of SARS be appointed, with investigative powers, to step in if there are signs of governance failing again. If that recommendation is accepted, the President might wish in the interim to consider re-constituting the Commission, in this or some other form, with altered terms of reference, to inquire into other matters of failed governance that could assist a new Commissioner to rehabilitate SARS.

[54] We are aware that the acting Commissioner has taken and continues to take steps to rectify many of the matters that have given us concern, for which he is to be commended, but there are limits on what can be achieved in the present state of uncertainty, which needs now to be brought to an end.

CHAPTER 2: THE STATE OF SARS - BEFORE AND AFTER

[1] The period under inquiry by the Commission spans the four fiscal years 1 April 2014 to 31 March 2018. Over that period what was once an admired institution became one that has evoked sufficient concern to warrant a commission of inquiry. This is what SARS was then, and what it became.

THE STATE OF SARS AT 1 APRIL 2014.

[2] The various tax and customs authorities that were in existence at the end of the apartheid era, including those that existed in the so-called homelands, were combined to establish SARS in 1997. The first Commissioner of SARS was Mr Pravin Gordhan. He was succeeded in May 2009 by Mr Oupa Magashula until he resigned in July 2013, whereupon Mr Ivan Pillay acted as Commissioner, until the appointment of Mr Moyane with effect from 27 September 2014.

[3] At the commencement of the period to which this inquiry relates SARS was on a trajectory that had earned it accolades domestically and abroad. According to Dr Randall Carolissen, whose evidence we deal with also in other parts of this report, a review of SARS in 2014 by the International Monetary Fund, benchmarked against its Tax Administration Diagnostic Tool (TADAT), showed that in most categories SARS was world class, conforming to good international practice in 15 of 27 indicators, and only one rung below good international practice in all but one of the remaining 12 indicators. A copy of his written submission, to which he spoke in oral evidence is **Appendix 4**. It was also respected by the Organisation for Economic Co-operation and Development, and was held up in this country as a model public institution.

[4] It was then operating under a model formulated early in its existence by Mr Gordhan and his team, directed at reversing non-compliance with tax laws, inherited

partly from its history. That model was founded on three legs – education, service, and only then enforcement – and the organisation was structured to meet that objective.

[5] 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.

[6] But in any organisation the morale of the workforce is key and in that respect SARS also excelled. If one speaks to anyone who worked at SARS before Mr Moyane took office one is bound to hear the phrase ‘the higher purpose’, and one finds it in the evidence of all witnesses in that category. It is a phrase that was coined and instilled in employees during the period Mr Gordhan was Commissioner of SARS, and was perpetuated by his successor Mr Magashula, and by Mr Pillay.

[7] It was instilled in them that they were not mere employees, but were in the service of a higher purpose, which was the building of democratic South Africa. They were public servants in the real sense of the words. Witness after witness spoke of the pride they felt working for SARS. We heard it said that skilled professionals left lucrative positions to join SARS because they wanted to participate in that higher purpose. We heard it said that the environment was stimulating and innovative, that debate was open and rigorous, that employees were willing to work long hours without extra remuneration when that was required, because they shared a commitment to that higher purpose of service to their country.

[8] Some of that will be found in the evidence of Ms Seremane, who joined SARS in 2009 as the executive for integrity promotion, and was dismissed, when asked what prompted her to join SARS:

‘Well I think it’s the brand, SARS, the reputation SARS but certainly it was the drive to actually contribute to the country realising that we have such a good institution that performs and [was] playing such a critical role in the country and I wanted to be part of that to contribute in the country’.

[9] Here is how the environment at SARS was described by Mr Ndlangalavu, who has been at SARS since 2001:

‘There was vibrancy, ma'am. People wanted to join the unit and the excitement and joy and SARS people I still want to believe even now are proud to work for SARS. I am a proud SARS official despite the challenges’

[10] When asked what made him proud he said:

‘Having been part of forming SARS and having been part of seeing transformation in a real sense. Yes, it’s true that when we were forming SARS, when we were transforming SARS, we were not aware of what we were doing. Only later in the later years when we were getting requests from other government departments to come and make presentations to them, or requests from other African countries to come and say can we come and learn [from] you, or to go and make presentations to SIAT in South America or OECD requesting us to come and make a presentation on how we’re doing tax education, we realised that there was something that we were doing that was special. We were not aware what we were doing. At the centre of it was passion, was commitment, was integrity, all done with humility’

[11] There is the evidence of Ms Mthebule, a trained lawyer who joined SARS in 2008:

‘To summarise, I would say I had lots of fun. It has always been a place, I mean, I’m not talking about the recent years, when we joined. You know cohesion that existed among colleagues, having leadership of a certain quality. People you felt you could look up to and learn from. I was a happy employee. Moreover, at that stage Minister Gordhan was talking about that term he liked, higher purpose.

You know we knew we could earn better salaries outside. It’s a fact but you worked for SARS

because you felt you're contributing something to your country. You're not there to work for yourself or for your family only. So I felt I'm a proud employee. I had support from colleagues, from bosses. I wasn't scared of approaching anybody. That's the kind of environment we had. I even took out some of my own personal time to spend here at work and push work because the division that I joined was still, you know, a little bit shaken. There was more work to be put in so I didn't even mind putting extra hours for no extra pay'.

[12] That is the environment at 1 April 2014 we heard described many times, both in the evidence, and by those who were interviewed who were afraid to give evidence in the open.

[13] 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 racial transformation fell short. We have heard that power within the organisation was excessively concentrated. There were also shortcomings in the operations. While there is undoubtedly some truth in all of that, the overwhelming thread that runs through the accounts presented to us, is the vibrant and dedicated environment I have described.

[14] But no organisation can stand still if it is to prosper, and the SARS Annual Performance Plan for 2014/15, prepared while Mr Pillay was acting Commissioner, announced that the SARS operating model had been reviewed and changes were to be implemented, to be completed by 31 March 2015. Details of the proposed changes appear from a letter by Mr Pillay to the Deputy Minister of Finance on 11 June 2014, which is **Appendix 5**. Two primary features emerge from the description of the review that was to be undertaken.

[15] First, the proposed changes followed the essential principles upon which the operating model had been based, and were directed at developing, refining and improving the effectiveness of the structure, rather than a major revision. Secondly, the

review and proposed changes had followed upon consultation with interested persons, and debate within EXCO. None of that was like the ostensible review that occurred.

THE STATE OF SARS ON 31 MARCH 2018

[16] What I have described is a far cry from the environment that existed at 31 March 2018. I reported earlier that the air at SARS reeks of intrigue, fear, suspicion and distrust. We heard of it in evidence, and we encountered it ourselves. Mr Ndlangalavu recounted how, early in his tenure, Mr Moyane had a plethora of CCTV cameras installed, such that employees felt themselves under constant surveillance, so much so that some employees took to covering the camera lenses on their computers with tape, lest they be watched while they went about their work, fearful of any perceived misdemeanour that might result in disciplinary proceedings.

[17] The trajectory of modernisation, that had been in the making for a decade, was summarily stopped when Mr Moyane arrived, with not so much as a word to the person who had been instrumental in creating it, and now only adjustments and adaptations are made to the systems from time to time, while the systems themselves degenerate as technology advances. The current Chief Officer of Digital Information Services and Technology (DIST), Ms Mmamathe Makhekhe-Mokhuane, spoke in her evidence of nothing more being done than to 'keep the lights on', which is hardly surprising when there has been only one strategy meeting in the fifteen months she has been in office.

[18] I also reported in my interim report that the organisational structure of SARS has been remodelled such that fragmentation of functions inhibits co-ordinated action over various disciplines, to the benefit of delinquent taxpayers and the disadvantage of major taxpayers who try to comply. The Large Business Centre (LBC) as it had existed was eviscerated to the detriment both of governance and 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 skilled professionals left. Others remain in supernumerary posts with their skills and experience going to waste. Customs was adversely affected, as we deal with in another part of this report. Measures to counter criminality were rendered ineffective and those who trade illicitly in commodities like cigarettes operate with little constraint. Relations between the Commissioner of SARS and other state institutions – the National Treasury, the Auditor-General, the Davis Tax Advisory Committee, the Financial Intelligence Centre – are icy, if there is any relationship at all, and SARS has lost its former high status amongst international bodies.

[19] When an organisation that was world class ends up four years later like that, it cannot but mean that the integrity and governance of the organisation has failed. Where the terms of reference require the Commission to inquire into the influence of institutional factors on SARS' performance of its duties the answer is very clear. The failure of integrity and governance at SARS, soundly evidenced alone by the change over four years, has certainly compromised the performance of its core function of collecting tax, to the detriment of the country at large.

CHAPTER 3: THE SEIZING OF SARS

[1] The transition of SARS from what it was to what it became was brought about by events that are shocking. We think what occurred can fairly be described as a premeditated offensive against SARS, strategized by the local office of Bain & Company Inc, located in Boston, for Mr Moyane to seize SARS, each in pursuit of their own interests that were symbiotic, but not altogether the same. Mr Moyane's interest was to take control of SARS. Bain's interest was to make money. This was not a plan for mere succession in public service.

[2] The Commission has no evidence that the parent corporation was complicit in what occurred, as the Commission was told by Bain's legal counsel it was not, but that does not put an end to the parent's responsibility. An international consultancy cannot lend its name and reputation to securing work in this country by the local office, and then leave the local office to its own devices. It secures the work through the reputation of the parent, and the parent is then obliged to see to it that the work meets its standards. If it wants to ignore what the local office does then it must leave the local office to secure work on such reputation as the local office might have. It cannot have both the benefit of its name and no responsibility for what is done in its name.

The Evidence of Bain and Co

[3] The head of the local office of Bain at the time was Mr Vittorio Massone. Soon after Mr Moyane took office, Bain was contracted, ostensibly to review, and later to re-structure SARS, which it did, with damaging consequences. Mr Massone said in his evidence that he was not aware of what was happening beneath the surface, and had he known he would have acted differently, but the facts show the contrary. Mr Massone and his local partners knew precisely what was going on, though perhaps they were not initially conscious of how brutal the process would be. An article written by one of its partners was at pains to say, correctly, that the first step in undertaking a project was to

understand its environment. The outstanding question for Bain, and it is one that Bain has withheld from being examined by the Commission, is just how much Mr Massone knew about that environment.

[4] Early in the life of the Commission, Bain furnished written submissions on the work it had done at SARS, which it supplemented with further substantial written submissions. It was invited to give oral evidence at a public hearing in support of the submissions. There was no hint in the written submissions, nor in engagements between Bain and counsel for the Commission in anticipation of the oral evidence, of what was to emerge.

[5] Mr Solomon Tshitangano is the Chief Director: Governance, Monitoring and Compliance at National Treasury. He took the Commission through documents concerning the procurement of Bain's contract. Mr Tshitangano seems to have a sharp eye for suspicious procurement activity. He noted that Bain had ostensibly prepared its bid in only one day, which raised suspicion in Mr Tshitangano's mind that Bain might have had access to the proposal before bids were invited.

[6] Mr Massone appeared before the Commission to speak to the written submissions that had been made by Bain. Prompted by Mr Tshitangano's observation that Bain's bid was ostensibly prepared in a day, counsel asked Mr Massone whether he had met Mr Moyane before the bid was made, which Mr Massone said he had done, but even then he concealed much of what had occurred.

[7] He said he had met with Mr Moyane on one occasion before Bain bid for the contract. Asked in what context he had met Mr Moyane, he said it was 'meeting people at events and situations and so on'. He said Bain had had no prior information of the proposal that was made ostensibly to review SARS. None of that was true. Indeed, the evidence of Mr Massone, both the evidence he gave before us, and his evidence in a subsequent affidavit, is littered with perjury, both in what he said and in what he didn't

say. The affirmation made by a witness is not only to tell the truth, but also to tell the whole truth, and that is not what Mr Massone did.

[8] In response to an invitation by the Commission to furnish written submissions on why certain findings should not be made, including that he had perjured himself, Mr Massone advised, through his attorney, that he had truthfully conveyed all he could recall at the time. We regret that we are not persuaded that when giving evidence Mr Massone could not recollect more of his engagements with Mr Moyane than he disclosed. He was deeply engaged and could not have forgotten.

[9] Mr Massone disclosed in his evidence, without elaboration, that at one stage Bain had produced a report for Mr Moyane. After he had given evidence Mr Massone was asked by the Commission to furnish a copy of the report, and an affidavit identifying and describing each occasion he, or any other person from Bain, had met or had contact with Mr Moyane, or with former President Zuma, before the contract was concluded with SARS.

[10] What followed was a period of obfuscation and evasion by Bain, as partners rushed from abroad to control the damage. Ultimately the report was produced, and an affidavit deposed to by Mr Massone was furnished to the Commission. Mr Massone was summoned to appear before the Commission once again, but he was said to have fallen ill and he returned to his home in Italy before that occurred. He did not appear again, notwithstanding that he was directed to do so by the Commission, and he is said still to be ill in Italy, though he has been able to consult extensively with Bain's advisers in Rome.

[11] Meanwhile, 23 lever-arch files of documents, most of which are irrelevant to matters that concern the Commission, but buried amongst which were certain internal emails I refer to presently, were delivered by Bain. Having furnished the affidavit, and dumped the documents, Bain decamped. It was afforded the opportunity once again for

a representative to appear before the Commission to explain its conduct, having been cautioned that its failure to do would necessitate the Commission drawing its own inferences as to what had occurred, but the opportunity was declined. The explanation proffered by its General Counsel for declining the invitation was that ‘at this time Bain believes there is no one other than Mr Massone who can provide meaningful information. Therefore, no other representative of Bain & Co will be attending the hearing on 22 October 2018’. That was itself untrue.

Bain’s Approach Towards the Commission

[12] Meanwhile, Bain had commenced its own inquiry, and announced it as follows in a media statement:

‘To reinforce the independence of the investigation and Bain’s commitment to addressing any new facts, we have established an oversight committee made up of senior global Bain partners and outside directors. Athol Williams, a Bain alumnus and a respected independent advisor, will chair this committee on an interim basis. He is a distinguished academic in the area of corporate responsibility, a corporate leader and lifelong social advocate. Bain’s contract with Mr Williams calls for him to do what is right for South Africa, without restrictions’ (emphasis in the original).

[13] As it turned out the committee was not established but Mr Williams was contracted to oversee Bain’s investigation. The Commission has had some useful exchanges with Mr Williams, and he favoured me with a draft preliminary report he had prepared, in which he said his role was focused on aiding the Commission, which was enabled by the following clause in his contract:

‘While engaged, should Mr Williams at any time determine that Bain is not behaving transparently with the Commission, Mr Williams will:

- First raise his concerns with the Bain South Africa Interim Office Head, Mr Tiaan Moolman, and seek resolution in good faith

- If resolution cannot be reached, Mr Williams has the liberty to share his concerns with the Commission'

[14] That is an extraordinary approach to be adopted by a major international consultancy that claims its commitment to transparency. It is not for Mr Williams to do the right thing for South Africa – though I have no doubt he will strive to do so – it is for Bain itself to do the right thing. And it is not for Bain to interpose Mr Williams between itself and the Commission to adjudicate whether Bain is behaving transparently towards the Commission. It is for Bain to demonstrate to the Commission that it is behaving transparently, which is clearly not the case. Indeed, since declining the opportunity to appear before the Commission, Bain has not engaged with the Commission at all.

[15] Should Bain wish to do the right thing, then it should be furnishing the Commission with all information in its possession, which includes the knowledge of its employees or partners, so that the material may be examined by the Commission in front of the South African people, and not confining its examination to one behind closed doors, with Mr Williams adjudicating whether the truth has been told.

[16] I must make it plain that any views Mr Williams might have do not carry any endorsement from the Commission. The Commission will decide for itself whether the truth has been told, and the way Bain has gone about things gives us no confidence that the full truth will indeed be told. Nothing makes it more plain that Bain has withheld, and continues to withhold, information from the Commission, than the preliminary report prepared by Mr Williams, from which it is apparent that even he has yet to be told where the truth lies.

[17] According to the report, Bain has located 3 000 documents that are relevant and 114 it has classified as 'heightened relevance documents', of which 'many, but not all' are said to have been submitted to the Commission. I am not sure what is considered to

be many, but of the 23 files submitted to the Commission, no more than a handful of documents were relevant.

[18] What is more, according to the report, 'while Mr Massone would certainly have had the most to offer the Inquiry', there are 'other senior Bain SA staff who could have shed some light on certain matters which may have been valuable to the Inquiry'. In fact, we are told in the report, the Bain investigation has conducted 'extensive interviews with key individuals who were known to be involved with the SARS projects or whose names surfaced during the document reviews', and 'the investigating team intends to conduct interviews with at least 17 individuals'. So much for the statement by General Counsel from Boston that 'at this time Bain believes there is no one who can provide meaningful information' to the Commission'. Even if some came to light only after that was written, it is apparent from the email correspondence, and their supporting affidavits accompanying that of Mr Massone, that at least Mr Stephane Timpano and Mr Fabrice Franzen, who were deeply involved in the project, and are still partners at Bain, could have provided 'meaningful information', which Bain is now withholding from examination by the Commission.

[19] While the Commission has not yet heard the full truth from Bain, the evidence before it tells a story that is disturbing enough.

[20] The affidavit of Mr Massone reveals that SARS was one of the first 'targets' in a campaign by Bain to get access to business in the public sector. Mr Massone met many times with Mr Zuma, and no less than seven times with Mr Moyane, before it bid for the contract. It reveals that Bain had planned in advance for the restructuring of SARS even before it had set foot in the organisation. And it reveals that the Minister of Finance, and the Bid Evaluation Committee and Bid Adjudication Committee of SARS, were misled by non-disclosure, which could amount to fraud.

[21] According to Mr Massone, his first meeting with Mr Moyane was arranged by Mr Duma Ndlovu pursuant to a written agreement between Bain and Ambrorite (Pty) Ltd, a company owned by Mr Ndlovu and Mr Mandla KaNozulu.

[22] That agreement commenced on 1 November 2013. In it the parties recorded:

‘Bain & Company SA, in collaboration of Ambrorite, has identified the Government and State Owned Enterprise sector as a strategic priority. This sector represents an important share of GDP and is an important buyer of consulting services. It is commonly accepted that to build a sustainable consulting business in South Africa a substantial participation to this sector is required.

In addition, Ambrorite intelligence has allowed Bain in the last few months to acknowledge that in the next few years a number of State Owned Enterprises and Agencies will be subject to leadership and strategic changes and will require significant transformation and turn-around processes. This is at “the core” of Bain activity and skills. Supporting competent, empowered and change orientated leaders in solving important strategic challenges is Bain & Company SA’s most important challenges.

‘However, current Bain positioning in this sector is extremely weak: in terms of brand positioning, relationships, understanding of the internal situations and competitive dynamics, purchasing policies and procedures.’

Bain & Company South Africa is of the opinion that a collaboration with Ambrorite would substantially benefit its business and the probability of success in this sector.’

[23] The agreement went on to record that, in pursuit of its objectives to, amongst others, ‘identify key priority targets in the Government/SOE sector’,

‘an initial analysis performed by Ambrorite for Bain preliminary shortlisted company like SA Revenue Service (SARS), SA Post Office (SAPO), SITA, Eskom.’ (sic)

[24] In short, the owners of Ambrorite would facilitate business opportunities for Bain, and SARS was one of the first targets. Consequent upon that contract, according to

Mr Massone, he was introduced to 'various key leaders, decision makers and executives from the public sector', including Mr Moyane and former President Zuma.

[25] Mr Massone disclosed ten or more meetings with Mr Zuma. The first meeting, he said, was on 11 August 2012, arranged by Mr Sipho Maseko, and also attended by Mr Ndlovu. He said this meeting related to a project called 'Phoenix', which was aimed at Bain getting business in all of South Africa's public institutions.

[26] He attended a further nine meetings and more until July 2014. On most occasions the discussions pursued the project called Phoenix. At a later stage Mr Massone presented other proposals to Mr Zuma, including a proposal to centralise all government procurement into one agency. He said in his affidavit that he wished 'to be completely clear' that at no point in any of the meetings was SARS discussed. That is contradicted by an internal email that he must have overlooked.

[27] Mr Massone said he was introduced to Mr Moyane because, so he was told, Mr Moyane had ambitions of becoming the next Commissioner of SARS, following the resignation of Mr Magashula. The purpose of the meeting, said Mr Massone, was to 'advise Mr Moyane on how to achieve his professional goals'. That explanation is facile. The agreement pursuant to which the introduction took place proclaims its purpose in explicit terms: the introduction was to secure business for Bain in the public sector, and one of its targets was SARS. Mr Massone must by then have had wind, perhaps from the 'Ambrorite intelligence', that Mr Moyane could be the next Commissioner of SARS.

[28] The first meeting with Mr Moyane was on 13 October 2013. By then, according to Mr Massone, he had met Mr Zuma on five occasions. Bain had also prepared a presentation from publicly available sources that comprised a series of 26 slides under the heading 'SARS 2.0'. The slides identified what Bain considered to be shortcomings at SARS and said at the outset:

'In order to **transform SARS** into an **innovative revenue & custom agency**, SA government will have to run a **profound strategy refresh** and **focus on execution to reach SARS full potential**'. (Emphasis in the original.)

[29] It is an extraordinary document. The first question one asks is why it was thought that SARS was not already an 'innovative revenue and customs agency', bearing in mind that that was how it was regarded both domestically and abroad? And on what basis it was considered that a 'profound strategy refresh' was required? Bain had not yet set foot in SARS. It knew nothing of the road SARS had travelled, nor of the vision upon which its organisation had been built, nor of the plans SARS had in place for its development. All it had were figures drawn from public sources. Quite clearly Bain was in search of business, and a 'profound transformation' of SARS would do, whatever the existing situation at SARS.

[30] The next encounter, said Mr Massone, was on 25 February 2014, when, so he said, he coincidentally encountered Mr Moyane at the residence of former President Zuma, and they exchanged pleasantries.

[31] Mr Massone said a meeting with Mr Zuma was scheduled for 3 April 2014, at which the establishment of a central procurement agency was to be proposed. He said that meeting never took place and was postponed to 26 April 2014. He added that he had no document or email that specifically related to that date.

[32] He described the meeting that was alleged to have occurred on 26 April 2014. He said a proposal for the establishment of a central procurement agency was presented to Mr Zuma, as well as the idea of a workshop to be launched after what he called 'the new government administration' was in place, a reference to the administration that would be in place after the general election, that was then imminent.

[33] An exchange of emails on 4 April 2014 reveals that the meeting scheduled for 3 April 2014 indeed took place. Mr Massone's description in his affidavit of what occurred at the meeting alleged to have taken place on 26 April, and the description in the email of what had occurred on 3 April 2014, coincide, from which it can be inferred that they both describe the same meeting, which occurred in fact on 3 April 2014. What is clear from the email is that SARS was indeed discussed. This is the email exchange:

Franzen to Massone:

'Ciao – just wanted to check how your “big meeting” went yesterday. Take care'

Massone to Franzen:

'Thank you, Fabrice, it went very well

- Sars is aa go, right after the elections
- central procurement agency: he loves it, wants an implementation plan
- wants to accelerate Phoenix
- -asked us to organise a workshop with the new cabinet of ministries after the elections (sort of new strategy by sector + RDO/mobilization)

So I'd say very well ..

I'll update the team on next call

Thank you'

Franzen to Massone:

'Congrats !'

Massone to Franzen:

'Be ready for SARS !!!! Tom passes by for coffee next Friday morning, if you want to say hi to him'

[34] It can be inferred from the exchange that Mr Massone was assured at the meeting with Mr Zuma that Mr Moyane would be appointed Commissioner of SARS, and that Bain was assured it would be awarded a contract to 'transform' SARS, after the general election, which was to take place on 7 May 2014. It is probable that Mr Moyane would also have been at the meeting.

[35] On 15 May 2014 Mr Moyane met Mr Massone at Tasha's Café in Melrose Arch, which Mr Massone described as a 'general catch-up'. Mr Franzen was also present. Given that SARS was to be 'aa go, right after the elections', and that Bain was to be 'ready for SARS', and that the general election had recently been held, and that a further presentation was prepared by Bain little more than a week later, it is doubtful the meeting was no more than a 'general catch-up'.

[36] On 26 May 2014 Bain prepared a presentation called 'TM First 100 days'. Mr Massone said the document 'summarizes for the candidate what his/her "report card" should look like after the first 100 days in office, assuming he/she was to be appointed to the job/position then aimed for'. I regret I do not see the document in that way. On its face it is a clear strategy to be followed by Mr Moyane upon his appointment at SARS.

[37] They met again on 2 June 2014 at the offices of Bain, where the 'TM First 100 days' was presented. Mr Massone was accompanied by two other partners of Bain, Mr Franzen and Mr Bour. Mr Franzen furnished an affidavit confirming his attendance at the meeting. I place little store on how he described the meeting, which is inconsistent with the presentation that was made, if he is not willing to explain in person what occurred.

[38] At the outset the presentation describes the 'objectives of the session' as follows:

- **Identify the "big items"** (programs, highly leveraged activities, ...) that will be fundamental to medium – term SARS transformation that need to be launched at the beginning, plus **some possible "quick wins"**
- **Discuss and prioritize the most important factors** that will drive and determine the success of SARS transformation and your personal success as Commissioner
- **Deep-dive on the key components of a 100 day plan** (and the items to be addressed even before that).

[39] What follows in the 32 slide presentation includes much of what had been contained in the earlier 'SARS 2.0' presentation. There is also a slide headed 'First 100 days: framework and key actions – for discussion', which lists those key actions under three columns. I pick out some of them for their significance to what happened.

[40] One heading was 'KEEP THE BALL ROLLING', under which one recommendation was 'Launch IT diagnostic'. IT capability had been built up in SARS over a decade, and Bain had no knowledge of what it comprised, yet it proposed that a diagnostic evaluation should be launched, which is indeed what occurred soon after Mr Moyane took office.

[41] Another key action was 'Testing BH and assessing performance of different components of COO perimeter'. The reference to BH was clearly a reference to Mr Barry Hore, who was Chief Operating Officer (COO). Just how he was to be 'tested' is not clear.

[42] Another slide is headed 'Build a healthy sponsorship spine to accelerate change and identify individuals to neutralize'. Below the heading is a pictorial representation of an hierarchy, with human figures identified as 'positive sponsorship spine', 'external influencers', 'watch out' and 'to neutralise'. The text reads

- Identify positive change sponsors bottom-up
- Leverage external influencers
- Identify individuals that could hamper change:
 - Watch outs
 - To neutralize.

[43] A letter written to the Commission by General Counsel from Bain's Boston office sought to place a benign interpretation on that slide, but we would have given greater weight to evidence of Mr Franzen, who attended the presentation, and was capable of explaining it himself before the Commission. Moreover, the interpretation advanced does not stand up to even cursory interrogation. As it turns out, individuals who might indeed have hampered this radical transformation by Bain were indeed neutralised, and

in no small measure, within months of Mr Moyane's arrival, and the neutralising continued in less brutal form for a year and more.

[44] There are two striking features of the strategy that was planned. The first is that it is all directed at change. It urged identification of the 'big items' that would be fundamental to change. Factors must be prioritised that would drive change. Individuals must be identified who would assist with change, and those who would hamper change. What was to be changed in particular, as emerged from the next meeting, was the organisational structure of SARS, a key being the components of the operations division under Mr Hore.

[45] A decision was taken that the organisational structure of SARS would be changed even before Bain and Mr Moyane had spoken to anyone at SARS. Bain knew nothing about SARS other than what was available from public sources. From information furnished to me by Bain it had no more than peripheral experience of a tax collection agency. And without knowledge of how and why SARS was structured as it was, it had no idea of the environment for which it had been structured. What was good for the tax authorities in New Zealand, and elsewhere, of which Bain in any event had only second-hand knowledge, is not necessarily good for SARS, and they might at least have asked those who understood SARS, if that was indeed their concern.

[46] The second striking feature is that it anticipated there would be resistance to the change. Those who would support change must be identified. Those who would hamper the change must be neutralised. Then there were those over whom to keep watch.

[47] This was not a strategy for succession in public service. Public servants succeed one another in service of a common goal, which is the welfare of the state. They have no need to neutralise other public servants. This was a strategy more appropriate to a corporate takeover. The presentation had nothing to do with tax collection. It had all to do with seizing control of SARS.

[48] Another meeting was scheduled to take place at the offices of Bain on 16 June 2014, according to Mr Massone, but he said he had no recollection of whether it took place.

[49] On 26 June 2014 they met again at the offices of Bain, at which a document headed 'Potential SARS organisation chart' was discussed. To a large degree it reflects the organisational structure that Bain later recommended.

[50] On 6 August 2014 Mr Moyane attended a breakfast hosted by Bain for its clients and potential clients.

[51] On 28 August 2014, on the eve of the announcement of Mr Moyane's appointment as Commissioner of SARS, another meeting was held at the offices of Bain, attended on this occasion, according to Mr Massone, by Mr Moyane, Mr Ndlovu and Mr Jonas Makwakwa, who was then an employee of SARS. That meeting coincides with events described in a Bain internal email of that date:

'Guys,

Just had a call and heard that the Sars announcement should happen tomorrow or monday.

Meeting later in the office, to discuss also procurement process

Fabrice/Stephane, how many teams did we say? Can we please think about managers, with and without Galactica? I guess we should have a few weeks to ramp up (procurement process) but we'll need to have a first contingent to start working asap ..

Thank you

Vittoria'.

To which Mr Stephane Timpano replied

'vittorio,

that's a great news

The last thinking was to start with 1 team (M+4 to +6), for 3 months to do fundamentally 2 things:

- 1) run a full operational / strategic assessment of SARS
- 2) assist Tom in starting properly his new role (direct “CEO” work)

We will be then able, based on the operational / strategic assessment, to build up the platform for a broader SARS transformational program (6-12 months plan)

Let’s discuss team face to face later.

stephane’.

[52] What occurred at this meeting could have been elucidated by Mr Stephane Timpano, had he been willing to have his evidence on affidavit examined by the Commission. In his affidavit Mr Massone said no more of this meeting than that Mr Makwakwa ‘shared his personal issues that he had been experiencing at SARS’. We have no hesitation finding that to be yet more concealment by Mr Massone. Having just had confirmation that Mr Moyane’s appointment was about to be announced, and the expressed intention to discuss also the procurement process, it is not credible that they gathered to listen to Mr Makwakwa’s ‘personal issues’ at SARS.

[53] We think it is fair to infer instead that there must have been congratulations all round, as the collaborators, with Mr Makwakwa now drawn into the fold, set about plotting their course towards securing a contract for Bain to undertake the ‘profound strategy refresh’ for the ‘transformation of SARS’ that it had set for itself a year earlier.

[54] An email records a further meeting at the offices of Bain on 22 September 2018, attended on this occasion by Mr Moyane, Mr Ndlovu and Mr Patrick Monyeke. The meeting is not disclosed or explained in Mr Massone’s affidavit. It appears from other evidence that Mr Monyeke is a long-standing friend of Mr Moyane. He appears again later, when the information technology contracts were awarded, which I deal with later in this report.

[55] Clearly Bain and Mr Moyane were in deep collusion to restructure SARS, no matter what they might have found at SARS. Neither was concerned for the interests of SARS, but for their own interests, that were at least aligned with one another, though they might not have been quite the same.

[56] Meanwhile, the public servants at SARS were pursuing the 'higher purpose', oblivious to what was to come.

The Procurement of the Contract

[57] After his appointment, on 11 November 2014, Mr Moyane addressed a memorandum to the Minister of Finance, purporting to seek the Minister's approval to approach independent consulting companies to assist with an evaluation of all its operations, including its operational performance, its information technology infrastructure, and its organisation and governance.

[58] The only basis in the memorandum for undertaking that massive 'transformation and turnaround of SARS' was what was said to be 'the first crack' that had surfaced with allegations made against the former Commissioner Oupa Magashula', and a 'number of media articles over the course of the year and especially the Hathurani and Johan van Loggerenberg matters'. A copy of the memorandum is **Appendix 6**.

[59] To suggest that a major evaluation of SARS was required because of allegations that had been made concerning Mr Magashula, who had in any event long since resigned, and because of newspaper articles, is perfectly bizarre. His recommendation to the Minister was the following:

'I therefor request that the Minister considers the above matters and give his approval for me to approach as an initial step a number of consulting companies listed in the SARS database, our

service providers, to discuss the above matter with the view of enlisting proposals for a turnaround plan for SARS’.

[60] The memorandum was relied on by Mr Massone to suggest the Minister approved the project, but that is not correct. The former Minister, Mr Nene, said in evidence before us that as this was an operational matter he was required to endorse only the process, with the hope that the implementation would be reported back to him

[61] What Mr Moyane represented to the Minister was untrue, both in what was said and in what was not disclosed. The memorandum conveys an intention to approach consulting companies in order to select one. In truth the only approach that was to be made to consulting companies was to entice them to participate in a procurement sham. What he ought to have said to the Minister is that he had already colluded with Bain on a strategy to restructure SARS, for Mr Moyane to take control, and for Bain to increase its wealth.

[62] Approval having been given by the Minister, SARS (it seems to have been Mr Makwakwa) at first approached Telkom, with a request to participate in a contract that Telkom had with Bain for procurement of the consulting services of Bain. Why would SARS be wanting to secure services by participating in the contract between Telkom and Bain, asked Mr Tshitangano, unless SARS had already decided that Bain should be appointed?

[63] Mr Massone said he had known nothing of the approach to Telkom. Once again that was untrue. On 4 December 2014 he wrote to Mr Maseko of Telkom as follows:

‘I received a call from SARS (the acting COO) who told me that they would like to use Telkom’s contract to give a mandate to Bain – apparently law (or practice) says that they can piggyback another SOE. This will enable an immediate start avoiding long and complicated tender processes.

I hope that's ok with you. I gave them Ian's contacts as they want to contact Telkom tomorrow morning'.

[64] When the possibility of participating in the Telkom contract came to nought, SARS turned to a closed tender process, which was in truth a sham, in which five consulting companies, including Bain, were invited to submit proposals for an initial 'diagnostic evaluation' of SARS. The Request for Proposals was issued on 11 December 2014 and bidders were invited to attend a briefing the following day. Proposals were to be submitted by 18 December 2014.

[65] Some of the documents submitted to the Commission by Bain, which included pricing of the project, were completed on 12 December 2014. How was it, asked Mr Tshitangano, that Bain was able to complete its pricing within a day, unless it had been briefed on the proposal beforehand? Asked whether Bain had had prior information of the proposal, Mr Massone said it had not. He said it was simple to prepare a proposal in a day, contradicting the email of 28 August 2014 recording that Bain would have a few weeks to 'ramp up' the procurement process. Bain had certainly known the proposal was in the offing, for four months or more. Indeed, it had been its architect.

[66] The pricing of Bain's bid was curious, but not in hindsight. The price offered by Bain for Phase 1 was R2.38 million, calculated at its ordinary rates less a discount of 50%, bringing its price slightly lower than the next lowest bidder. Pricing its bid in that way meant that while phase 1 was undertaken at competitive rates, any further work that followed phase 1 would be at double those rates. As it was said in an email from Mr Massone to his colleagues on 16 December 2014:

'I think we should put the full pricing in the hourly rates and at the bottom, whatever number comes out, we say we'll do a 50% discount just for this phase 1

Otherwise it'll be tricky to change the rates going forward, In the document, the full rates need to be showed'.

[67] That is indeed what occurred. Having completed phase 1, at its discounted rate of 50%, Bain was appointed, by deviation from the ordinary competitive procurement process, to undertake the restructuring of SARS (phase 2) without again bidding against other service providers. On this occasion it charged its ordinary rates, which were double the rates that had secured it phase 1, though it allowed an initial discount of 12%, which later increased incrementally as the contract proceeded, up to about 19%.

[68] In short, Bain got its foot in the door by foregoing R2.38 million of its ordinary rates in competitive bidding, only to secure phase 2 at its ordinary rates less 12% without competitive bidding, which earned it a further R164 million for phase 2. Progression to phase 3 would have earned it about R50 million more.

[69] In his evidence the current Chief Financial Officer of SARS said it was not uncommon, where multiple contracts are envisaged for a project, for bidders to offer a 'loss leader' at the outset. If that is indeed the case, we see no proper reason why that should be permitted in public procurement. It has the potential for the abuse that occurred in this case, and we recommend that that form of bidding be reviewed by the National Treasury.

[70] It can be inferred from the email of 28 August 2014 I referred to earlier, and the manner in which Phase 1 was conducted, which I come to presently, that Bain had no intention of undertaking a 'diagnostic' evaluation. It said itself that in Phase 1 it would undertake an 'operational / strategic assessment' of SARS, to set the platform for the 'broader SARS transformational program (6-12 months plan)' that had been planned.

[71] The minute of the Bid Adjudication Committee meeting, at which the recommendation of the Bid Evaluation Committee was accepted, does not identify who asked and who answered the various questions that are recorded in the minute. A copy of the minute is **Appendix 7**. The minute reflects that the question was asked;

'Did the BEC consider advisory and implementation as phase 1 and 2 to be done by the same service provider?

to which the answer was:

'Yes they did, but concluded by saying they will appoint consultants to do advisory and at a later stage go to market again to appoint a service provider to implement. The other reason is that they needed to know what is to be implemented first which will be addressed by the report of from the consultants appointed to advisory phase. It was also mentioned that the idea is that the appointed service provider must give recommendations that can be implemented by any service provider not them alone.' [my emphasis].

[72] Upon completion of phase 1, however, the contract for phase 2 did not 'go to market again', as the Bid Adjudication Committee had been told it would do. Instead SARS deviated from the ordinary procurement process, which, said Mr Tshitangano, is permitted by National Treasury regulations only in the case of an emergency, or if there is only one supplier. There was no emergency, nor was Bain a sole supplier. On the contrary, it was expressly said at the Bid Adjudication Committee meeting that the appointed service provider for phase 1 must 'give recommendations that can be implemented by any service provider not them alone.'

[73] It is clear from what occurred the previous year that there was no intention on the part of Mr Moyane or Mr Makwakwa that there would be a return to the market for phase 2. Phase 2 had already been planned, and Bain was to get the contract. Once again there was non-disclosure of what had occurred, both in the evaluation and adjudication of the bids, on this occasion by both Mr Moyane and Mr Makwakwa, who was at the meeting of the Bid Adjudication Committee.

[74] We think it can be inferred, both from the pre-determined plan to restructure SARS, and from what occurred in the course of the ostensible diagnostic evaluation, that the procurement process was manipulated to secure the restructuring of SARS by Bain, which would serve Mr Moyane's interests in taking control of SARS, and Bain's interest

in making money. Moreover, an 'IT diagnostic' was indeed initiated, as Bain had suggested, which led to further work being done by another consultancy, at a cost to the taxpayer of a further large sum, that turned out to be largely pointless, which I deal with later in this report.

[75] We have little doubt that the Minister would not have given his approval had he known what was occurring. We also have little doubt that the Bid Evaluation Committee and the Bid Adjudication Committee would not have approved the appointment of Bain had the machinations been disclosed. There is also little doubt that SARS was prejudiced or potentially prejudiced in consequence of the non-disclosure. In both respects it could constitute fraud, and we recommend that the National Prosecuting Authority consider prosecution.

[76] Upon Mr Massone's revelations, when the partners from abroad scurried to this country, Bain said in its media statement that it had set aside the money it had received from SARS, to be dealt with as the Commission might direct. Upon an intimation from the Commission that it has no authority to dispose of money received from SARS, Bain has now unconditionally paid to SARS all the money it received, together with interest, amounting in all to just short of R217 million. We were told that Mr Massone has also resigned.

[77] While the payment of money, whether by returning fees to SARS, or by sponsoring good deeds, is no doubt admirable, Bain ought to know from the fact alone that three commissions of inquiry are at present underway concerning state institutions, that what the South African people want to know is what happened to their country's institutions, and the information Bain has will help to find that out. If Bain wants truly to make reparation, then it should give to South Africans what they want, and not what Bain thinks they should have, which it has steadfastly refrained from doing. Payment of money without prior disclosure of the truth, is not reparation but is marketing instead.

[78] What is clear from the evidence I have summarised is that Mr Moyane arrived at SARS without integrity, and once that is the case, we are not able to exclude any of the acts detailed in the terms of reference from having occurred. What we have found and report on are manifestations of the failure of integrity and governance we have observed, but it is probable there were others we did not detect.

CHAPTER 4: THE FABRIC OF THE SARS RESTRUCTURE

[1] Any suggestion that SARS was in a poor state at 1 April 2014 flies in the face of all the evidence. As it was expressed by Dr Randall Carolissen, whose written submission is **Appendix 4**, when asked whether, in his view, SARS was in need of restructuring in 2014:

‘Absolutely not because we had a well-defined strategic journey that we were on, and we were clear about where we were going, what the next step should be. In some cases where we’re not clear, as they manifest themselves we were agile enough to deal with that. So in fact, let me be quite blunt about this, none of us that participated in that process, myself included thought that this was an optimisation of the journey that we are on. Doing things a bit smarter, because you must always be open. We’re a learning organisation. So none of us anticipated a radical restructuring, not in our wildest dreams,’

[2] He observed that there is always room for innovation and development, and we have pointed out that towards the end of his term as acting Commissioner, Mr Pillay announced that the SARS operating model had been reviewed, and changes were to be implemented, but that is nothing like what occurred.

[3] The first contract awarded to Bain was ostensibly to undertake a ‘diagnostic’ evaluation of SARS. The exercise was shrouded in secrecy from the managers of the various divisions, Mr Moyane having given instructions to Bain on who to talk to, under the eye of a steering committee headed by Mr Makwakwa.

[4] Every managerial employee who gave evidence before us said he or she was either not consulted in the course of the exercise undertaken by Bain, or was consulted only perfunctorily, often by junior employees of Bain. Many were puzzled at why it was thought necessary to ‘fix what was not broken’. With knowledge of what had preceded it, it comes as no surprise that there was little consultation, albeit that Bain contended that there was, but produced no documentary evidence to that effect. The Bain email of

28 August 2014 makes it clear Bain was not interested in finding out why SARS was structured in the way it was structured. Its interest was in finding out enough to enable it to re-structure SARS, whether that was needed or not, or, as was said in the email, to undertake an 'operational / strategic assessment' of SARS, to set a platform for a 'broader SARS transformational program' expected to take six to twelve months.

[5] Having completed its 'diagnostic', which took about six weeks, Bain was appointed to undertake phase 2. Although the Bid Adjudication Committee had been told the appointed service provider for phase 1 must 'give recommendations that can be implemented by any service provider not them alone,' and that any later work arising from phase 1 would be 'go to market again', that is not what occurred, nor was it intended by the conspirators to occur. Instead, phase 2 was awarded through a deviation from the ordinary procurement process, on spurious grounds, that earned Bain approximately R164 million calculated at its ordinary rates less an initial discount of 12%.

[6] Bain presented four potential organisational structures for SARS, and Mr Moyane insisted upon adaptations, resulting in a fifth that was adopted and implemented. The most significant change insisted upon by Mr Moyane was to combine the roles of overseeing individual tax and of corporate tax respectively into one division called 'Business and Individual Tax' (BAIT), reporting direct to the Commissioner. In due course Mr Makwakwa was appointed Chief Officer of BAIT, the effect of which was that he had operational control of all taxpayer affairs.

[7] Much was sought to be made, in justification for the re-structuring, of the fact that the new organisational structure was presented to, and approved by, the SARS Advisory Board under the chairmanship of Judge Kroon, and then by the Minister of Finance. The evidence of Mr Massone and Judge Kroon, together, discloses that that presentation took place over no more than an hour, followed by discussion with Mr Moyane and Mr Makwakwa, who can be expected to have promoted the new structure.

Judge Kroon acknowledged that he, at least, had no knowledge of the organisational structure that then existed, or why SARS had been structured in that way.

[8] We do not place any value on an approval for the re-structuring of SARS founded on no more than a presentation given over an hour, with no knowledge of the structure it was to replace, and with no guidance other than from Bain and Mr Moyane and Mr Makwakwa, all of whom had colluded to re-structure SARS. As for ministerial approval, the evidence of the then Minister of Finance, Mr Nene, was that his approval was for the process of appointing consultants, not the outcome.

[9] The first middle managerial employees of SARS knew of the restructuring was when it had been adopted, and was presented to them as a *fait accompli*. When the new structure was presented some of the existing units were no longer there and others had been materially altered.

[10] The new organisational structure of SARS was often called the 'new operating model' but that is a misnomer. An operating model is a strategy upon which a structure is built. There was no new strategy upon which the structure was rebuilt by Bain. It did no more than restructure the organisation, based largely, according to Mr Massone, upon what Bain considered to be 'best practice', drawn from Bain's second-hand knowledge of other tax collection agencies, with little insight, nor any apparent interest, into why SARS had been structured in the way in which it was, and in what direction SARS was headed.

[11] The effect was devastating for many employees who were displaced, and proved to be detrimental to the efficiency and governance of SARS. Mr Massone said the new structure was an improvement on what existed, if only it had been utilised in the way it was intended, but the fact of the matter is that it was not utilised in that way, and enabled what occurred. Mr Massone said as well they did not understand at that time who they were dealing with, that Bain may have been 'used', and in hindsight would

have acted differently. An email written on 3 December, two days after Mr Hore resigned, demonstrates they knew exactly who they were dealing with. 'Goodbye Barry Hore ...', wrote Mr Franzen to Mr Massone on 3 December 2014, to which Mr Massone replied 'Now I'm scared by Tom.. This guy was supposed to be untouchable and it took Tom just a few weeks to make him resign.. Scary ..'

[12] The principal feature of the new structure, apart from combining all taxpayer affairs into BAIT, was to fragment many of the functions that previously had operated cohesively. The most prominent was the operation of the Large Business Centre. Formerly it had provided large business with an 'end-to-end' service. For each of various industries there was a relationship manager, who formed a relationship and interacted with large business concerns in that sector, of which the relationship manager would have specialised knowledge. He or she was supported by various disciplines dedicated to that sector, which enabled all the affairs of the taxpayer, whether it be income tax, PAYE, VAT, and so on, to be serviced from one port of call. The new organisational structure fragmented the various disciplines, for example, sending lawyers to the legal division and auditors to the auditing division, with the result that the LBC was eviscerated, it was no longer one port of call, and there was no overall picture of the taxpayers concerned, nor of the industries in which they operated. We do not suggest such disciplines could not have been effective in such configuration, but without a clear change management plan, informed by genuine consultation spelling out the fundamental defects of the configuration preceding the restructure, it was bound to cause disruption and bewilderment.

[13] That it has been detrimental to business it previously served is evident from the submissions and evidence the Commission received from representatives of professional bodies. Mr Retief, who is the chair of the National Tax Committee of the South African Institute of Professional Accountants, had written an article entitled 'Turnaround Time at SARS', describing the frustration now experienced by large business organisations in consequence of the disbanding of the LBC. That was supported by Professor Nel of the South African Institute of Tax Practitioners, who told

us that the frustration now experienced by large business has been reflected in declining taxpayer morality, in which there is 'increased pressure on the tax practitioners to leave out income and to claim expenses that are risqué'. Mr Farber, the senior executive for tax of the South African Institute of Chartered Accountants described how the healthy engagement in SARS of the past has declined over the period now under review. We have no doubt the LBC served an important function at SARS and we recommend it be re-established.

[14] Another case of fragmentation was in the compliance division. Headed by Dr Malovhele, it had developed a tool to measure and monitor tax compliance, from which strategies could be devised to target areas of non-compliance, without which there is obviously no revenue. The tool it developed was commended by the IMF to other countries and representatives from tax authorities in Africa visited to learn from the model. When the new organisational structure took effect the compliance research unit was gone, with some of its functions distributed elsewhere. Dr Malovhele said:

'And as we speak there's no BAIT [Business and Individual Tax] compliance programme. There's no customs compliance programme. There's no SARS compliance programme, you know, even though SARS went to parliament and said we have the compliance but there isn't because where it was moved they didn't have the competency and the skills to do it. So I wrote quite a number of notes to senior people explaining to them there's a problem here. The compliance research function it's no more. It's not there.' But I never got any feedback or the outcome that I needed I didn't get.'

[15] Bain's restructuring of the legal and enforcement units was also damaging. Before the restructuring, SARS had a High Court Litigation Unit, the mandate of which was to deal with significant high court revenue litigation. It worked closely with the LBC and Enforcement to support their operations with agility. Ms Lalor, the former senior manager of the unit explained in an affidavit:

'The Unit functioned centrally and had a presence in Gauteng, Durban and Cape Town. The workflow was centrally managed and received notification of intended litigation through a dedicated email address. We had direct access to the Chief Officer... when we needed urgent

instructions. ... We were able to work effectively and cut through the various components of SARS swiftly, when it was required. Similarly, our approval processes for engaging in litigation and incurring legal costs was simple and swift, enabling us to timeously engage Counsel and prepare for litigation.'

[16] Ms Sarita Lubbe said in an affidavit that before the restructuring, approvals for legal action would be granted within 24 - 48 hours, allowing for speedy reaction time, but now they can take many months. The restructuring dissolved Ms Lalor's job and left the unit without a manager. Bain splintered the unit into regional structures and failed to establish new reporting lines. In Ms Lalor's words, the unit became 'a shadow of its former self'.

[17] The Chief Officer: Legal Counsel, Ms Refiloe Mokoena, submitted an affidavit in which, amongst other things, she said the new policy she introduced was approved by EXCO, and she also challenged the witnesses to identify cases in which there had been delay, but that all misses the point. The point is that multiple approvals are now required, whereas the cohesiveness of the old structure avoided that.

[18] The effect on Enforcement was particularly severe. Mr Dion Nannoolal of debt enforcement said:

'In the past we could have brought a preservation order on a group of companies with maybe four or five signatures or six. Now we need anything between eight and 12 signatures. So I can assure you we've lost, and I'll show you a submission, we have lost possibly hundreds of millions of rands over the last few years because of these inefficiencies.

Legal counsel approval takes 1 month to a year for approval on memos. In summary, it could take up to three years after the original transgression to proceed with a preservation order (as an example) or to commence collection steps.'

[19] The troubles of Enforcement under the new structure were not confined to the ineffectiveness of Legal Counsel. Previously effective enforcement units disappeared

altogether, as with a unit known as 'national projects', that had investigated organised crime, and a unit known as 'centralised projects', that had investigated high profile, sensitive or complex taxpayer affairs. Mr Hendricks, who managed Cape Town office of national projects, described what happened when the new structure was presented:

'And we looked and we saw but there's no national project. We asked the question in the open forum and the answer we got was that's because they don't exist in the new operating model. That is how we were informed that national projects had been disbanded. There was no consultation. I even asked my national manager at the time, was she consulted, and she said no. She wanted to know if any of us were consulted, the answer was again no. It had just been decided, we don't know who to this day, that national projects would no longer exist'.

[20] The same happened to centralised projects. Ms Lubbe, who was previously part of that unit, said she was never told that centralised projects had been dismantled:

"I don't have any formal record, but if I remember correctly, during June 2016 we noticed on SARS' electronic system used for employee-related functions, such as the submission of leave, that some employees' reporting lines have been amended. In my case, my direct manager was no longer Pieter Engelbrecht but was Dion Nannoolal. At the time I did not even know who Mr Nannoolal was... The transfer was effected without even one consultation with our team..., the status of our cases or the risks involved in handing the matters over to other divisions."

[21] Bain's new structure fragmented units which, said Ms Lubbe, were effective because they had operated 'end to end', meaning from the investigation phase (including risk profiling and audit), to litigation related to investigation and recovery. Members of these units were reallocated to different departments, or relegated to supernumerary positions, so that no one unit had sight of an entire case. The effect was that it became impossible to have strategic inputs from legal, audit and collections simultaneously, as had previously been the case, which undermined due governance.

[22] Customs was also detrimentally affected by the re-structuring. The customs modernisation programme between 2011 and 2012 had transformed customs. SARS had halved the time it took to import and had introduced world class automation and substantial compliance improvements with regard to illicit cigarettes, clothing and

textile products, and narcotics. In 2013, South Africa received special mention in the World Bank 'Doing Business' Report for having improved the most in the ease of trading across borders. In 2015/2016, the World Bank Customs Efficiency Index ranked South Africa on par with countries like the United States and France, the highest it had ever been.

[23] By 2018, South Africa had regressed to pre-modernisation ratings. Inspection processes are said now to be the longest they have been in seven years: 23 days compared to two days in 2013. Customs revenue collections have declined. In addition to the effects of the restructuring, Mr Marais of the South African Association of Freight Forwarders described to us how stakeholder forums that had existed before fell apart, and how the clearance process had slowed to the detriment of the economy.

[24] Ms Rae Vivier was the head of Customs when Bain began its work, but nobody spoke to her. Notwithstanding her role in turning Customs around during the modernisation programme, she found herself in a supernumerary position. Once again, the restructuring fragmented Customs. She said:

'The new operating model has had the consequence that the units who impact the most on the bulk of the compliance improvement activities in customs report separately into the chief officer at different seniority levels which does not engender end-to-end value chain management of revenue flows and undermines accountability and coordination. Efficiency has deteriorated and inventories have grown substantially (by 319%). Risks are increasing (duty suspension declarations have grown by 8% in the last FY and R9.1 billion gap in Chinese imports of clothing in 2015'.

[25] Mr Massone said the fragmentation of units ought not to have had that effect, if there had been co-operation amongst the various generic sections, but that is not what occurred. The principal basis for the new structure, so his evidence and Bain's written submissions convey, was that the new structure reflected 'best practice' in other countries. The question never asked was whether best practice in, for example, New Zealand or Europe, was suited for this country, bearing in mind the history against which the earlier strategy had been devised. Bain was not even aware that the Tax

Administration Diagnostic Tool of the International Monetary Fund had scored SARS as conforming to good international practice on half the indicators, and only one step below on all but one of the rest.

[26] On the connection between declining revenue collection and the new organisational structure, Dr Carolissen said, in support of a careful analysis:

'Look like I said, let me take the revenue for instance because that I can speak with some authority on. Revenue is driven by the economy. So we know and we can work on how much the economy contribute, there's various statistical measures we can do. The second thing the policy changes which we have discussed, government had to raise policy, sorry tax rates so I'm not going to talk about it but certainly the slippage in compliance, the figures that I've given you and some of the money that's trapped in the system, certainly had a massive impact on revenue because that speaks to internal efficiencies. Sorry that speaks to the compliance and internal efficiencies, inefficiencies and then the way that we are construct, the LBC clients now have to interface with so many different interfaces where they had one stop entry. So from a revenue perspective this model certainly had not, the indicators are that the model has absolutely put us, put us back. Now you can go and investigate other areas, you can look at compliance, sorry audit figures, you can look at audit statistics, you can look at heat rate, you can look at surveys about taxpayer happiness. So there's a whole host of other things you can look at to see whether I indeed hit the hammer on, from my advantage point we are not optimally organised and in fact we are at sub, by far sub optimal organised.'

[27] But perhaps most significant was the devastating consequence for employees, which I describe presently.

[28] The significance of the fragmenting of the organisation, is that it affected not only efficiency, but served also to break down elements of governance. What had existed before were units and divisions capable of having oversight of all steps in the tax collection process, and having an overall view of a taxpayer, or taxpayers in a particular industry, in that they were dealt with end-to-end. The units in the LBC had all the expertise readily to hand to give the unit as a whole an overview of taxpayers and industries. The enforcement units could see the whole picture, and not only snapshots.

That was an important element of governance in a tax collection agency, that calls for inherent checks.

[29] The fragmentation brought about by the restructuring inevitably weakened oversight of decision making in the various functions, with detrimental consequences both to efficient tax collection, and to governance. The same can be said of the effect on governance of the moratorium on the modernisation programme, which I come to next.

[30] We recommend that the Compliance Unit be re-established, and that a high -level Integrity Unit be established on at least the level of seniority and importance that existed before.

CHAPTER 5: INFORMATION TECHNOLOGY AND THE GARTNER CONTRACTS

[1] SARS is an information technology driven business. Information technology plays not merely a supporting role, as it might do in other government bodies, but enables its core business. Secondly, SARS needs to be linked to the digital economy if it is to fulfil its mandate effectively. It cannot be permitted to fall behind, and should ideally be ahead of developments in the digital economy. Information technology skills in support functions, while they have their role, are not sufficient to maintain and develop SARS core systems.

[2] At the commencement of the period under inquiry SARS had an effective and world-class IT division. Technology was central to the Modernisation Programme and the driving force behind many of the achievements up to that time. SARS IT worked closely with the Modernisation Programme Office, and with a generous budget, and dedicated people, had the capacity and capability to quickly and efficiently initiate and complete projects within the Modernisation Programme. The division was led by a 'core team' headed by Mr Hore.

[3] Technology was at the heart of the Modernisation Programme, and its successes are well-documented. Mr Artwell Kunene, Executive: Business Relations in DIST, said that at that point 'IT was a lifeline to SARS. SARS lived and thought IT. IT was central to everything.' According to the evidence, operating at that high level was attributable to

The skills and experience of the staff;

The dedication and commitment of these staff which meant additional hours and taking on work not strictly within one's job description to ensure things got done;

A substantial budget;

Strong leadership;

A clear sense of direction and sense of higher purpose.

[4] This success was highly dependent on the particular individuals at SARS at the time – most importantly, Mr Hore, who aggressively drove the agenda. It is unlikely that this period of productivity and advancement would have been sustained indefinitely, nor is it likely to be repeated at that pace now that Mr Hore and some of his team have left SARS.

[5] Before his departure in January 2015 Mr Hore prepared extensive Handover Notes that give some insight into the direction and future of the Modernisation Programme:

1. The Modernisation Programme was to run in three phases. The initial phase required SARS to create capacity, design the programme in detail and prepare the organisation for modernisation. In the next phase, SARS would implement the new business model throughout the organisation. The final phase of the Modernisation Programme was the delivery of world-class technology-driven services to support SARS' new business model.¹
2. The Modernisation summary states *"SARS anticipates further benefits with the Modernisation Programme in the next few years. These will be achieved by overhauling the systems and processes yet to be addressed by the modernisation programme, refining the innovations already implemented and introducing further new services and facilities."*

¹ Driving strategic change at SARS the modernization journey 2007 to 2013.

[6] The modernisation programme applied advanced technology and systems to enable SARS to implement a business model that incorporates sophisticated risk management and the promotion of voluntary tax and customs compliance. It aimed to deliver performance improvements in three areas: Service; enforcement and compliance; and cost efficiency.

[7] The Executive Summary states that the main thrust of the Modernisation Programme was due to be completed in 2015, but cautioned:

‘However SARS must ensure that the technology infrastructure implemented as part of the programme and the many automated systems and processes it supports do not become obsolete. In order to maximise returns on its extensive investment in technology and maintain high levels of performance SARS will need to continue upgrading and refining its operations. Advances in technology that could help SARS better meet its mandate will need to be investigated and where suitable integrated into the organisation’s operations. Furthermore, errant taxpayers and traders are becoming increasingly sophisticated in their efforts to evade tax and customs legislation. SARS must keep abreast of the latest international trends in countering such developments.’

The Modernisation Programme is likely to be succeeded by a constant but gradual evolution of SARS technology, systems and processes in order to keep pace with local needs and international trends. SARS will, however, always measure future investments in technology against the benefits they will provide the organisation as it strives to better meet its mandate to collect tax and customs revenue, ensure compliance to tax and customs legislation, facilitate trade and secure South Africa’s borders’.

[8] In September 2014, Acting Commissioner Ivan Pillay informed SARS via a Newsflash that EXCO had:

‘approved the SARS modernisation programme comprising 25 projects, of which 8 are legally mandatory projects and 3 are collaborations with other government agencies. The list of projects under modernisation is now the baseline and may only be amended with EXCO’s approval. EXCO will review progress on the projects regularly. Several projects could not be

accommodated within the current programme. The Programme Management Office will maintain a list of the proposed projects to plan for their implementation.”

[9] Three months later, after Mr Moyane arrived, without even consulting Mr Hore, he informed all employees in an internal communication, that

‘In order for me to understand the status of the organisation, its processes, practices and the technology we use to accomplish our mandate, I require a comprehensive review of the organisation. In this regard, I have decided to seek the advisory services of external service providers with the necessary expertise and resources to conduct an independent review of the SARS Operating Model, Structure and its Modernisation Programme... Because of this decision, I have put a moratorium on the rollout of further modernisation releases, until the completion of the review of the Operating Model. The exceptions being a few critical releases ...’

[10] If taken at face value it is extraordinary that a modernisation programme that had cost billions should be stopped in its tracks only because Mr Moyane wanted to understand it. Had he genuinely wanted an understanding he could have sat down with Mr Hore.

[11] As yet there is no meaningful policy, programme or strategy for the role of technology in SARS. This lack of direction has been exacerbated by the division being without a Chief Officer for almost a year after the re-structure. The Chief Officer: Digital Information Services and Technology (DIST), Ms Mmamathe Makhekhe-Mokhuane, appointed in early 2017, has been seemingly unable to provide direction.

[12] According to her own evidence DIST currently operates only to ‘keep the lights on’ and without any new or focussed innovation. While she spoke in her evidence of many matters that needed ‘talking about’, we were not able to discern any strategy, or any real prospect that DIST will come to terms with, and reverse, the heritage of four years of neglect, within the foreseeable future, while information technology remains

under her management. We recommend that the new Commissioner of SARS recruit one or more suitably qualified persons from within or outside SARS to be placed in a position to take control of SARS information technology, and to develop and implement a strategy to renew development of the technology.

[13] In his report for the 2016/17 year, in the chapter on Information Technology Governance, the Auditor-General noted that SARS 'had not defined the DIST performance criteria for the 2016/17 financial period due to restructuring which affected all the departments and the DIST executive position was still vacant. Furthermore, the initial IT strategic plan was submitted to the executive committee for review and had to be revised.' He recommended that 'as a matter of urgency' the position be filled, that the plan be approved, and that DIST performance criteria for the following financial year be clearly documented 'to enable SARS to achieve its core mandate'. Apart from the position having been dubiously filled, nothing of that had occurred at the end of the period under inquiry.

[14] SARS is hamstrung by the difficulty of recruiting and retaining skilled IT professionals capable of dealing with the level of technology that exists at SARS, and to effectively procure the hardware and software needed to fulfil its mandate. It appears that these difficulties are not insurmountable, but require decisive and experienced leadership, which at present SARS does not have.

[15] I observed elsewhere in this report that Bain had recommended a year before that there be an IT review. An Irish enterprise called Gartner was brought in for that purpose. Gartner conducts information technology research, which it makes available to clients on subscription. A smaller part of its business is to provide consultancy services. SARS has subscribed to its research service for some years and still does so.

[16] Until 2016 Gartner did not have a presence in South Africa, and was represented by a sales agent. If it secured consultancy business it would contract the work to

independent consultants. While the contract to provide its consultancy services in this case was between Gartner and SARS, delivery of the services was to be made by its sales agent.

[17] Mr Willemse, employed by the sales agent, represented Gartner in the early discussions that led to its appointment, and in the execution of the various contracts. Mr Willemse knew Mr Patrick Monyeki, professionally, who is well-grounded in information technology. Mr Monyeki is also an acquaintance of Mr Moyane. I have also drawn attention in chapter 4 to an email indicating that a meeting was arranged to take place at the offices of Bain, to be attended by Mr Monyeki and Mr Moyane, amongst others, on 24 September 2014.

[18] Mr Willemse said he was approached by Mr Monyeki who told him a new Commissioner had been appointed at SARS, who had 'identified various issues' relating to its modernisation programme that needed attention. One was whether the SARS strategy was aligned with and supported its business strategy. Another was concern as to whether the expenditure incurred in the modernisation process had yielded the return on investment that SARS anticipated. We think it is also clear from a report produced by Gartner that it was also asked to investigate whether there had been irregularities in the procurement process in the course of that modernisation programme.

[19] Mr Willemse said he did not know what Mr Monyeki's relationship was with SARS, nor in what capacity he was acting, nor did he ever ask. We regret we are sceptical of that evidence. Mr Willemse said he was told by Mr Monyeki that SARS had identified Gartner as the organisation to undertake the project, and he was asked to provide input for the development of terms of reference, being the mandate that would be given to Gartner. In anticipation of the meeting, which occurred on 10 December 2014, he had received an email from Mr Monyeki:

‘Attached please find some of the thoughts I captured when interacting with the client. Can we perhaps please try and clean up and enhance these terms of reference so that we have a complete TOR for tomorrow’s meeting with the client’

I’m available on the phone throughout the day to discuss your thoughts on this. Also if you do not have enough time today please send me some draft I strategy review rfp’s which we can then amend. ‘

[20] The terms of reference were written in collaboration between Mr Willemse and Mr Monyeki. For a time in his evidence Mr Willemse said he considered this was to be a ‘sole source’ contract, and sought to justify writing the terms of reference on that basis. The ground upon which he contended Gartner was a ‘sole supplier’ was that Gartner was the only consultancy not tied in some way to another supplier of goods or services. That quality is of no significance. It is a consideration that might be taken account of when determining which supplier to choose, but as Mr Willemse conceded on closer examination, Gartner was the not the sole supplier of the services that were required.

[21] There are obvious risks in a potential supplier writing its own terms of reference. The first is that it might write the terms such that they favour its appointment. Another risk is that the supplier might tailor the terms of reference such that it would be appointed for further work.

[22] In this case the initial contract was to conduct a review of the modernisation programme (Phase 1), which Gartner ultimately did at a cost of approximately R12 million. However, it then secured a further contract (Phase 2) which earned it another R144 461 000. This was followed by additional contacts – the GRAP implementation that cost R9.8 million and the Star assessment that cost R8.7 million.

[23] Mr Willemse said he had no expectation of further work after phase 1, although he accepted that reviews of that kind could often lead to further work. An email written by him to Mr Monyeki on 11 December 2014 suggests the contrary:

'Hi Patrick. I've changed the outcomes slightly. My suggestion would be that the approach we would follow is to

- Gather strategic and business requirements
- Perform IT assessment
- Analyse current state findings
- develop future state recommendations
- develop roadmap and associated initiatives
- deliver final report and presentation to the Commissioner

Coming out of the roadmap will be additional initiatives that we could assist them with so the first phase is really the review and the recommendations via the roadmap.' [my emphasis].

[24] Mr Willemse said SARS asked Gartner to subcontract part of the work to a company from their preferred list to 'ensure adherence to their empowerment policies'. At first Garner was reluctant to do so but on 9 January 2015 Gartner received an email from SARS to the effect that Mr Makwakwa had asked for additional requirements. Mr Willemse said at that point he realised that Gartner did not have sufficient people to do the additional work. Knowing that Mr Monyeki's company, Rangewave, had access to consultants on contract, he asked Mr Monyeki if he could use their services.

[25] The explanation for subcontracting part of the work to Gartner was fallacious in two respects. Mr Michael Mavuso, who was Acting Senior Manager: ICT at the time, testified that SARS never had a preferred list of empowerment partners. He also said that, since Gartner's South African agent was a level 1 BEE company, there was no need for it to subcontract to an empowerment partner.

[26] The persons concerned were duly contracted by Rangewave to do the work, for which Rangewave received portion of the fee charged by Gartner. Whether that was 30% or 40% is not clear. It appears that no written contract was concluded between Gartner and Rangewave.

[27] Mr Lithgow was employed by Gartner, but was located abroad. He said his role in the project was threefold. He was the senior executive accountable to SARS for delivering the work. He was accountable to Gartner for running the project on ethical lines in line with the contractual arrangements. And he facilitated the gathering of information from within the organisation that supported tax administrations.

[28] He had no direct involvement in the procurement of the contract, but on 13 January 2015, after a phone call from Mr Willemse, he wrote an email to others in the organisation saying:

'All – we have been asked to bid for a piece of work in S Africa Revenue – Tax Office. We have been discussing this since 17th December and Paul Turton has been involved in reviewing the approach and SoW. IT is an IT Review and Modernisation programme. The total value is around \$1m and it will sign in late January or early February.

There is an issue that needs your input. S Africa have a policy of Black Empowerment. This means that a company has to demonstrate that it is providing opportunities to black majority population. Unless we can demonstrate this it means that our bid can be vetoed.

The client has proposed that we use a small company that is led by an ex Government CIO whom Neville knows. This would add the necessary 'proportion' of Black Empowerment. The impact on us would be a 70/30 split (\$700kGartner/\$300k partner) – 70% of the work by Gartner and the remainder by the partner. Neville has vetted them and he is content that they are qualified to do the work.

The question is how we contract with them and recognise revenue. We are not able to mark-up – would make the engagement uneconomical for client. It is a similar situation as Stockholm Stad where the client insisted that in order for us to have the work we had to use a specific partner.

The suggestion from Neville is that their revenue/invoicing is treated as BIPT with a mark-up of 5%-10% for managerial fees. But I suspect we would not be able to recognise as revenue – not sure if this is important given that it will be detrimental to margin.

Stephen – as they are a Sales Agent I am not sure how involved we are in the sub-contractor arrangement?

The client is showing signs of work starting in the next 10 days so there is some urgency in addressing this issue.

Mike’.

[29] In his evidence Mr Lithgow said he did not understand that the appointment of Rangewave was a condition for Gartner to be awarded the contract, but acknowledged that that was contradicted by his email, which had been written shortly after a telephone conversation with Mr Willemse. Explaining what he meant by a contradiction, he said ‘my contradiction is that I cannot confirm that the client directly proposed that we should use Rangewave’, which does not seem to us to be a contradiction at all. It merely conveys that he has no direct knowledge of whether that occurred. However, we think it is clear from what was reported to him by Mr Willemse that appointment of Rangewave to a share of the contract was a condition for Gartner’s appointment, which was the ‘empowerment’ partner referred to in the email. We see no reason why we should not accept the contents of the email at face value, which is a contemporaneous record, and which also accords with the probabilities. Given the detailed terms of the email, it is difficult to see what Mr Lithgow could have misunderstood what he was told by Mr Willemse, which he speculated he might have done.

[30] There have been criticisms of the work performed by Gartner, and justifications advanced in return. Whatever its quality it turned out to be largely worthless because it was never implemented by SARS. Mr Lithgow had concerns during the course of the contract that Gartner’s recommendations were not being implemented, and raised them with Mr Moyane, whose response was that he would resolve his concerns, but the concerns continued. An extract from the evidence of Mr Lithgow gives a general picture of what occurred as he saw it:

‘And, you know, I accept that we completely failed because from what we’ve heard this week, you know, nothing any longer exists of what we’d done and nothing has been implemented which to me professionally is genuinely distressing.

We have a vast repository of the work that we have done. My confidence that even 10% of that can now be found is low. Now, do you blame us or do you blame somebody else? I don’t know

who you blame but what I am saying is that we have, I 've had a team of – I had people crying on the phone having been contacted not about this Commission but now having an understanding that the amount of effort and commitment that they made and generally with the people in SARS and I know we've heard a lot of people who say were weren't happy with Gartner etcetera and everybody has their own right and I'm sure there's a lot of people along those lines.

All I can say is the people we worked with were desperate to make things better. They were proud of the organisation they were part of and they enthusiastically wanted to embrace change. And there is a sense that that has not happened. So you could say so okay, Mike, so this R200 million that we spent on you is completely wasted. You know, or you have not delivered us value for money whoever way you term it. And I'd answer in two ways.

Can I justify the money that [was] spent? Yes, I can justify can justify that and I think we did that through various avenues. Has it delivered value for money for SARS? And my answer in a very clear manner is no, because we have not seen any evidence or significant evidence of the work that we've done has now occurred. Now there may be bits and pieces in place.

In some ways that's even worse because what's happened is bits of the organisation have moved forward but other bits have not so actually you've now got a really confused situation because now nobody knows what is happening. You know, have we changed or have we not changed? Are we going to change? So yes, as a professional I am upset but the effort that we put into this may not have delivered what all parties had hoped for.'

[31] So far as it is suggested that SARS was altogether to blame for non-implementation of Gartner's proposals, we don't think that is the case. For example, Gartner recommended that the call centre systems (custom-built for SARS) be replaced to allow for extra digital channels such as web chat etc. As part of Phase II, Gartner was contracted to do six tasks on the Customer Service Project Stream. The quoted fee was approximately R7 million. A Request for Proposals was never issued for this work because the proposed solution was too expensive, which Gartner acknowledged in its project completion report: 'The key challenge experienced during this project was the lack of funds in order to go ahead with the procurement of the Omni-Channel solution in 2016. Moreover, no one consulted with Ms Sallie about whether Gartner should be contracted to do the Phase II work – including the drafting of the RFP. It was work that was completed, but ultimately added no value for SARS as it was impractical and could never be implemented.

[32] We do not think any real purpose is served by attempting to make findings on the quality of or necessity for work that was done by Gartner, on which there are differences of opinion even within SARS. Suffice to say the work turned out to be largely useless, and large expenditure wasted, because it was never meaningfully implemented. No doubt a contributor to that was SARS itself, though as I have indicated, we do not think it can all be laid at the door of SARS.

[33] What is concerning however, is that whatever its ignorance at the outset, Gartner must have become aware that the work it was doing was not adding value to SARS. I have pointed out that in his evidence Mr Lithgow posed the question: 'Has it delivered value for money for SARS?', to which his answer was: 'in a very clear manner is no', which leads one inevitably to the further question: Why, then, did Gartner, without question, simply continue doing useless work? We do not think in a public institution, consultants should be simply doing what they are told, without evaluation of what they have been asked to do. In our view they have a professional responsibility to the public, which is paying for its work, to question the integrity of the instructions they receive where a red flag goes up, as it did in this case.

[34] More concerning, however, is the manner in which the contracts were secured, which did not follow the ordinarily required competitive procurement process. Even Mr Lithgow acknowledged a number of unusual features. It was unusual for Gartner, he accepted, to settle the terms of reference with a third party without knowledge of his or her mandate and why he or she was involved at all. He would have been 'cautious and asked more questions' on the relationship between Gartner and SARS and Rangewave, had he known Mr Monyeke had been the person who had engaged in drawing the terms of reference. He was surprised that phase 2 did not go out to the market, bearing in mind its size.

[35] SARS itself was aware that the procurement process in respect of Phase 1 was irregular. On 10 July 2015, Ms Mogogodi Dioka, then Procurement Executive, sent a memorandum to the Commissioner asking for condonation in respect of Phase 1.

Condonation is a procedure required by Treasury when a public entity becomes aware that one of its procurement processes is unlawful. The chief accounting officer is required to condone the irregularity and report it to the Treasury.

[36] Mr Moyane approved the condonation on 13 July 2015 and asked the Chief Financial Officer to investigate what had happened. Notwithstanding that Mr Makwakwa was the project sponsor and drove the procurement process, the investigation resulted in Ms Dioka losing her job and Mr Mavuso being disciplined.

[37] At the time Mr Moyane condoned Phase 1, SARS contracted Gartner for Phase 2. SARS' national adjudication committee met on 8 and 14 July 2015 to discuss a request to deviate from a competitive procurement process in terms of Treasury Regulation 16A.6.4 and award Gartner an implementation project for a two-year period at a cost of some R144 million. The justification advanced for deviation was that the IT review was urgent because SARS had to ensure that 'the IT review was aligned with and synchronised to the process of designing the new SARS operating model' that Bain was undertaking. Gartner's Phase 1 work meant they were poised to undertake Phase 2 quickly. On that basis, the national adjudication committee supported the deviation and Mr Moyane approved it on 20 July 2015.

[38] This was an improper use of the deviation process. In the first place, and as Mr Tshitangano of National Treasury said in his testimony about SARS' procurement of Gartner's services, the type of urgency contemplated by 16A6.6 is an emergency situation where lives are at risk. Secondly, the national adjudication committee had approved contracting Gartner without a competitive (or any) procurement process for Phase 1 on the basis that Phase 2 would be put to market. They then used the fact of Gartner's involvement in Phase I to justify the deviation for Phase 2.

[39] We were not at all impressed by the evidence of Mr Willemse, who prevaricated and avoided direct answers to questions. We are also sceptical of his evidence that he

had no knowledge of Mr Monyeki's relationship with SARS, but if that is indeed true, he should have ensured that he did know. We also think it most improbable that the apportionment to Rangewave of some of the work was coincidental and had nothing to do with Mr Monyeki's relationship with SARS.

[40] We think it is probable that Mr Willemse was well aware that the ordinary competitive procurement process was being unlawfully bypassed. He said at first that he understood competitive bidding not to be required because Gartner was a 'sole supplier', which allowed for departure from that process, but that explanation could inevitably not be sustained, and we consider it to have been disingenuous. Ultimately he accepted that Gartner was not the only party who could offer the service, but then resorted to protesting ignorance of the proper process for procurement.

[41] The initiation by Mr Monyeki of drawing the terms of reference, the absence of explanation of his role, the haste in which the contract was procured, the departure from the ordinary procurement process, when there is no apparent reason why the contract was urgent and Gartner was not a sole supplier, the notification to Mr Lithgow that appointment of Rangewave was a condition for Gartner to secure the contract, the doubtful explanation by Mr Willemse for appointing Rangewave, together raise serious questions of what was occurring.

[42] In our view the transaction warrants inquiry by SARS as to whether it considers the process of procurement to have been unlawful, in which case it ought to consider whether to have the contract declared void. What consequences there would be if the contract is found to be unlawful is not a matter for the Commission to consider. We recommend that SARS considers commencing proceedings to set aside the contracts and to recover expenditure incurred that added no value to SARS.

[43] There is another aspect of the IT review that bears mention. Part of Gartner's mandate in Phase 1 was to review SARS' procurement processes during modernisation.

The contemporaneous emails between SARS, Mr Willemse and Mr Monyeke show that Mr Makwakwa expanded the terms of reference for Phase 1 to include this review. Gartner found no notable irregularity in Mr Hore's procurement processes, whereupon SARS contracted Grant Thornton in mid-2016 to undertake 'Project Lion' at a cost of some R12.5 million. The scope of Project Lion was to conduct a preliminary forensic investigation into the expenditure related to the procurement of goods and services for the SARS Modernisation and Technology projects from 2017 to 2014, and to establish whether the SARS modernisation programme had delivered value for money.

[44] Grant Thornton delivered their report on 19 December 2016. The report is inconclusive and merely recommends that 'a further investigation be considered by SARS'. SARS accepted the recommendation and wrote to National Treasury on 30 August 2017 to seek approval to deviate from a competitive procurement process to appoint Grant Thornton to render Phase II of Project Lion at an estimated cost of R50 million. National Treasury declined the request on 18 September 2017. On 6 April 2018 the acting Group Executive for Procurement retracted SARS's request for deviation for the appointment of Grant Thornton for phase II of Project Lion.

[45] It all indicates that Mr Moyane was intent on unearthing fault with the procurement of goods and services for the SARS modernisation process. Some R12.5 million and more was spent on doing so in Phase 1 and Project Lion. With little to show for the money Mr Moyane had in mind spending a further R50 million on phase II of Project Lion, which was prevented only by National Treasury's intervention. Meanwhile, developing the core systems was on hold.

[46] We have said elsewhere that information technology has inbuilt checks that serve an important governance function, which it is essential to restore.

CHAPTER 6: THE RESIGNATION OF SENIOR EMPLOYEES

[1] The most senior employees of SARS are the Commissioner and its Chief Officers, who report direct to the Commissioner. Immediately before Mr Moyane took office they were 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), and Mr Peter Richer (acting Chief Officer: Strategy, Enablement and Communications).

[2] Two weeks after Mr Moyane took office, on 12 October 2014 a report appeared in the Sunday Times newspaper, alleging that what it called a 'rogue unit' existed within SARS, whose members had secretly installed listening devices in the home of then President Zuma. That report was followed in the course of the next year or more by about thirty other reports concerning the alleged activities of the unit. About two years after the first report the Sunday Times retracted its allegations and apologised but by then there had been tragic consequences for SARS and the country and for those employees the Sunday Times reports had implicated.

[3] Prior to its publication the official spokesperson for SARS, Mr Adrian Lackay, had had wind that the report might be in the offing, and had urged Mr Moyane to take steps to counter it, but he had been ignored. The Sunday Times has yet to disclose the source of the report but it could not have come at a better time for Mr Moyane.

[4] Having read the report in the Sunday Times, Mr Moyane called together the members of EXCO and demanded to know what they knew about the reported 'rogue unit'. All the members disavowed any knowledge.² The members of EXCO were

²² There is some disparity in the evidence as to precisely when that occurred. In my view the best account, which fits with other events, is that it occurred on 13 October 2014, the day after the first Sunday Times report appeared. It was notified to all employees at ARS in an internal communication on 10 November 2014, which can only have been long after it had occurred.

summoned once again, on this occasion with their subordinates, and were asked once again what they knew, and the members EXCO once again disavowed any knowledge. Mr Moyane promptly announced that he had no confidence in the members of EXCO and that it was disbanded. The unit that was said to be 'rogue' was also closed down on the instruction of Mr Moyane.

[5] In the absence of a rational explanation for having acted as Mr Moyane did, and we cannot think of one, the explanation must necessarily be found elsewhere. Mr Moyane had barely arrived at SARS, with no experience of the organisation or of revenue collection, yet almost immediately he denounced and humiliated his senior management who might be expected to have advised and guided him as he came to grips with his new role, 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 an alleged unit of which at least most of the Chief Officers could not be expected to have had knowledge. I think the inference is inescapable that this was the first step in 'neutralising' possible detractors as foreshadowed in Bain's 'TM100 days' presentation.

[6] In short order Mr Hore resigned, Mr Pillay and Mr Richer were suspended and later resigned, and Mr Ravele resigned. Why that occurred so far as Mr Pillay and Mr Richer are concerned requires explanation.

The So-called 'Rogue Unit'.

[7] The unit concerned was the successor to a unit that had been established in about 2008 to counter the illicit trades in commodities such as liquor, cigarettes, and counterfeit goods. It started in about 2007 when a proposal was considered for funding

staff within the National Intelligence Agency to address organised crime and the illicit economy. Mr Pillay was then General Manager: Enforcement.

[8] Mr Pillay and Mr Gordhan, who was Commissioner of SARS, addressed a memorandum to the Minister of Finance, requesting approval 'to fund a special capability within NIA to supply SARS and law enforcement with the necessary information to address the illicit economy.' Approval was granted by the Minister but negotiations with the NIA came to nought and a unit within SARS was established instead. Known initially, so it seems, as Special Operations it was then called the National Research Group, which was later disbanded, but six members were retained as the High Risk Investigation Unit (HRIU). It reported to Mr Johann van Loggerenberg who reported, in turn, to Mr Ravele.

[9] Why such a unit was considered to be unlawful is not clear to me. While the National Strategic Intelligence Act prohibits the covert gathering of certain intelligence, that applies to intelligence concerning threats to the safety of the state, which hardly applies to intelligence relevant to collecting tax. That members of the unit might at times have acted unlawfully, that SARS employment policies might have been breached, that members might unlawfully have acquired and used equipment, all of which came later to be alleged, I see no reason why SARS was and is not entitled to establish and operate a unit to gather intelligence on the illicit trades, even covertly, within limits.

[10] Indeed, that was the view expressed to SARS in late 2015, which seems not to have been made public by SARS. An opinion was furnished to the former Commissioner of SARS on about 1 September 2015, in response to the findings of a panel chaired by Adv Sikhakhane SC, by Adv Trengove SC and Adv Nxumalo, who advised that SARS:

- may keep people under surveillance in the public domain but not in private.
- may follow a person or vehicle in the public domain but not in private.

- probably may place an electronic tracking device on property to trace its movements. It may however not place an electronic tracking device on a vehicle to follow the movements of its driver because it impinges on his or her privacy.
- may watch a person or property such as business premises, residences, containers, etcetera but only in the public domain.
- may take photographs or videos of people or property in the public domain but not in private.
- may not listen to or record private conversations unless a SARS official is a party to the conversation.
- may not electronically record third party conversations by using listening devices.
- may record conversations between SARS officials and third parties.
- may accept information from informers on the basis that their identities will not be revealed.
- may accept information from a person even if it knows that the information was unlawfully obtained. It may however not accept stolen property.

[11] It was said to be unlawful by a panel chaired by Adv Sikhakhane SC, but I find nothing in its report to persuade me why that was so. Adv Sikhakhane was asked if he could elaborate but his reply took it no further than what was said in the report. The SARS Advisory Board chaired by Judge Kroon, reported to the Minister, and issued a media statement, saying the unit was unlawful, but in evidence he told the Commission that was not a conclusion reached independently by the Board, but had been adopted from the Sikhakhane panel, and he had come to realise it was wrong. Indeed, he supported the re-establishment of capacity to investigate the illicit trades, which we recommend.

The Panel Chaired by Adv Sikhakhane SC

[12] In early 2014 Mr Johan van Loggerenberg was engaged in what appears to have been a turbulent romantic relationship with Ms Belinda Walter. In about May 2014, in an apparent fit of pique for a breakdown of the relationship, Ms Walter lodged a complaint against Mr van Loggerenberg with SARS. She alleged, amongst other things, that in the course of the relationship Mr van Loggerenberg had unlawfully disclosed taxpayer information to her. The allegations came to the knowledge of the media, which reported on it sensationally.

[13] Mr Pillay was the Acting Commissioner at the time. He appointed a panel to investigate the complaint.³ In August 2014 the panel produced a three-page report that was inconclusive.

[14] In September 2014 Mr Pillay appointed another panel, comprising Adv Muzi Sikhakhane SC, Adv Nasreen Rajab-Bundlender and Adv Patrick Ramano, with terms of reference arising from the complaint against Mr van Loggerenberg. Before its investigation was complete the allegations in the Sunday Times were published, which it then investigated. The reason for doing so was expressed in the report as follows:

‘The existence of the NRG was not volunteered to the panel until it was revealed in the media. The panel independently found sources that had been part of this unit since its inception. To the extent that the existence of this unit has been at the centre of the complaints against Mr. Van Loggerenberg, we investigated its origins. We also investigated its origins simply because our terms of reference included the investigation of any other matter that we deemed deserving of such investigation’

and

‘Shortly after the panel was appointed and commenced its work, the media reports escalated and alleged the existence of a covert unit that had been operating at SARS. By this time, we had

³ The panel comprised Mr Moeti Kanyile, an attorney in private practice, Mr Clifford Collings, Group Executive: Anti-Corruption and Security, and Mr Brian Kgomo: Group Executive: Internal Audit.

already interviewed some SARS officials, including Mr. Van Loggerenberg. It must be stated that the existence of such a unit in any form was not specifically part of the terms of reference. However, the terms of reference extend, in our view, to the consideration of the existence and operations of a covert unit, to the extent that had we not considered such issues once they became apparent, we would have failed in our obligation to fully respond to our mandate’.

[15] In a report dated 5 November 2014, the panel reported, amongst others things, that the HRIU and its predecessors had been established unlawfully, that the recruitment, funding and practices of the units might have violated SARS’s human resources policy, and that the HRIU should be disbanded (it had already been disbanded in October).

Reviving the ‘Rogue Unit’.

[16] I dealt in the introduction to this report with the repeated attempts, in various ways, to resuscitate the alleged ‘rogue unit’ before this Commission. I have said as well that what members of the unit might or might not have got up to is not the concern of the Commission, and if unlawful acts were committed the remedy is to report them to the authorities. The alleged ‘rogue unit’ is relevant to this Commission only so far as it explains the consequences of the revelations in the Sunday Times.

The Resignation of Mr Pillay

[17] One of the early steps taken by Mr Moyane, which must have been in about mid-October 2014, was to cause Ms Kumalo, the Chief Officer for Human Relations, to obtain an opinion from SARS’ attorneys on the lawfulness of a payment received by Mr Pillay from the pension fund upon taking early retirement, and his subsequent re-appointment under contract. In essence, in the event of early retirement, a member is entitled to the benefits that have accrued to him or her, less a penalty calculated according to a formula. If the member retires with the full benefit that has accrued, the

employer must make up the penalty to avoid an actuarial shortfall in the fund. That is what occurred in his case.

[18] Mr Magashula was the Commissioner of SARS at the time and Mr Gordhan was the Minister of Finance. Mr Vlok Symington, a lawyer employed by SARS, with particular knowledge of pension rights, expressed his opinion that the arrangement was lawful. Mr Magashula approved and recommended the arrangement for approval of the Minister of Finance, who was Mr Gordhan, saying that a similar arrangement had been made with other employees many times. According to an affidavit deposed to by Ms Minee Hendricks, who had been seconded to assist Mr Gordhan in his position as Minister of Finance, she brought the request to his attention, and he asked for more information. Mr Gordhan raised the matter with a number of people over the next three months, including the chairperson of the SARS Remuneration Committee, before he granted the request. The opinion furnished by SARS' attorney on 5 November 2014 was that the arrangement was indeed lawful.

[19] Also by what must have been about mid-October 2014, Mr Moyane had decided to appoint a firm of forensic consultants, KPMG Services (Pty) Ltd, to carry out investigations for SARS. The contract for the provision of its services was first signed for SARS on 27 October 2014, and was signed for KPMG on 29 December 2014. Also on 29 December 2014, a service request was issued by SARS, specifying the scope of the investigation to be undertaken, which was to perform independent investigative tasks that were required to be 'focused on the conduct of' Mr Pillay, Mr Richer, Mr van Loggerenberg and Mr Pikie' (who was subsequently dismissed on unrelated grounds) referred to particularly, but not exclusively, in the report of the Sikhakhane panel.

[20] According to the report produced by KPMG, its investigation entailed an average of 20 to 30 professionals, who together reviewed 860 000 emails imaged from 23 computers that had been seized, and considered in excess of 1.36 million documents, going back as far as 2003, at a cost to the taxpayer of about R24 million (which has since been repaid to SARS). The cost to the taxpayer for the lawyers who participated in the

process can be assumed to have been some millions more. We do not consider it helpful for achieving the purpose of this inquiry to delve into questions that arise concerning the preparation of that report.

[21] Meanwhile, on about 11 November 2014, Adv Brassey SC recorded in a memorandum for SARS that he had been instructed, based upon reports that had appeared in the media, that Mr Pillay may be implicated in acts of malfeasance, and he was asked 'as a matter of extreme urgency to consider whether there is potentially any substance in the suspicion currently entertained and, if there is, make recommendations (of a very preliminary nature) on how the matter can best be investigated and ultimately brought to finality'. I think it is clear that by then the Sikhakhane panel had not yet delivered its report to SARS. Having been furnished with a 'handful of documents', and having had a short consultation, Adv Brassey said:

'In the course of the consultation that I had with my instructing attorneys, they explained that it might be necessary to suspend Mr Pillay pending the outcome of these investigations. I can see little basis for taking so drastic a step at this juncture. If suspension is ultimately invoked, it should only be at the stage when Mr Pillay demonstrates an obdurate refusal to cooperate or when, following the requisite interviews with him and others, it appears that there is indeed a case to answer.

In deciding whether to suspend, my consultant should appreciate that suspension is typically required, in circumstances such as the present, only if there is some reason to suspect that evidence or witnesses will be corrupted. Before Mr Pillay is suspended, I hasten to add, he should be told of the substance of the possible charges against him, and of the reason why suspension is being contemplated. He should be invited to respond to these statements by explaining why suspension would be inappropriate in the circumstances'.

[22] The report of the Sikhakhane panel, signed on 5 November 2014, was later furnished to Mr Moyane, who handed it to Mr Pillay. Mr Pillay responded to the report on 3 December 2014 with a 34 page 'critique', taking issue with various findings of fact and of law in the report. He sent the critique to Mr Moyane and requested permission

to circulate the critique amongst senior members of management. Mr Moyane's response the following day was extraordinary:

'I acknowledge receipt of your envelope with two sets of documents. I have not read the 34 page document.

I cannot approve your request to circulate the report to the Chief Officers. At this stage I do not consider it appropriate that you share your views with the chief officers as this could be construed as an attempt to influence or impose your own views on them'.

[23] Disregarding the advice that Mr Pillay could be suspended only if there was reason to suspect that evidence or witnesses would be corrupted, and that he must be given the opportunity to respond to why he was being suspended, Mr Moyane called Mr Pillay to his office on 5 December 2014 and handed him a notice of suspension. Mr Pillay told him he had responded to the allegations in his 34 page critique, to which Mr Moyane replied that he had not read the critique, and did not intend reading it, as it was no more than Mr Pillay's opinion.

[24] Mr Pillay challenged the suspension in the Labour Court, which ordered SARS to withdraw it on 18 December 2014, on the following grounds:

'On the facts of this matter as they have been presented in the papers it appears that the applicant has not been afforded any opportunity to make representations before the decision to suspend him was made. I draw this conclusion despite the Commissioner's averment that he invited the applicant to make submissions'.

[25] The following day Mr Pillay was invited to make submissions 'as to why you should not be placed on precautionary suspension pending investigations into various allegations against you', and given reasons for the proposed suspension to which he was invited to respond. I think it can be taken that this was no more than a formality. Mr Moyane had earlier declined to read Mr Pillay's critique and there is no reason to think he had now changed his mind. Mr Pillay responded on 14 January 2014. On 21 January 2015 Mr Moyane wrote to Mr Pillay rejecting his submissions and advising that

'I have decided to place you on precautionary suspension pending an ongoing investigation (including a forensic investigation conducted by KPMG into allegations of unlawful conduct within SARS in which you have been implicated).'

[26] Thus within weeks of Mr Moyane's arrival at SARS three things had happened. He had suspended EXCO for reasons not explicable on any rational grounds. He had asked for an opinion on the lawfulness of Mr Pillay's pension arrangement. He had decided to employ KPMG to conduct investigations, which turned out to be concentrated on Mr Pillay and others. A month or so later, he refused even to read Mr Pillay's response, but yet suspended him.

[27] There is no apparent reason why Mr Moyane would be asking for an opinion on the lawfulness of Mr Pillay's pension arrangement, when no issue had arisen around it, from which I think it can be inferred that one of the first things he did was to call for Mr Pillay's employment file. Why would he then ask for an opinion on the lawfulness of an arrangement long in the past when no issue had arisen around it? Which employer would spend what must have been R30 million or more to investigate an alleged transgression or transgressions on the part of four employees? An employer who genuinely wanted to know whether proper procedures had been followed in appointing staff seven years previously might just as well have asked the employment division. If the employer wanted to know who had bought equipment one might expect the relevant accounts department to be asked. If he or she had wanted to know what the staff had been up to one might expect the head of the division to have been asked to investigate and report. None of that called for KPMG to be the first port of call, at a cost of millions. Mr Lebelo suggested that Adv Brassey had advised on 11 November that a forensic investigation was called for, which is correct, but that was after SARS had already signed the KPMG agreement. And if an employer wanted to know what had happened in 2007, why would its investigators trawl through documents going back to 2003? And which employer acting bona fide would refuse to read the employee's explanation for his alleged conduct before suspending him?

[28] Then add the case of Mr Richter. He, too, was served a notice of suspension on 5 December 2014, by Ms Kumalo, in the presence of Mr Lebelo, but they were unable to furnish reasons for his suspension, as Mr Richter recorded on the notice of suspension. The notice of suspension is **Appendix 8**.

[29] Put together those facts and in our view the inference is inescapable that Mr Moyane was bent from the start on getting rid of them and set about finding a basis for doing so, on whatever grounds that could be found. He had, after all, been advised by Bain that he should neutralise those he thought might hamper him, and Mr Pillay was certainly considered to be one.

[30] On 5 February 2015 notice was given of disciplinary steps against Mr Pillay on ten charges. Nine charges related directly or indirectly to the 'rogue unit'. The tenth charge related to the pension arrangement. The proceedings were to take place before retired Chief Justice Ngcobo.

[31] On 29 April 2015 Adv Brassey and his two juniors addressed a memorandum to their instructing attorney, not included in the files produced by Mr Lebelo, recording a consultation the previous day:

'Yesterday we recommended to our client, SARS, that of the three sets of charges currently being pressed against Mr Pillay SARS, Deputy Commissioner [it is not clear in which categories each of the charges had been placed], the charges concerned with the so-called rogue unit should be held in abeyance. Our advice was premised on the fact that the evidence, so far as we have been able to gather it, is far from conclusive on these charges and that witnesses who might be called to substantiate the case were proving to be uncooperative. In response our client, represented by Mr Luther Lebelo, has instructed us that all three charges should be pressed together, and we happily submit to such instructions.'

Furthermore:

'The documentary evidence on the activities of the rogue unit is as presently advised thoroughly unsatisfactory. All we really have are the 'dashboard' reports that were made by the unit from time to time to SARS top management'.

[32] Mr Lebelo said in evidence that it was not he who had given the instruction but that it had emanated from discussion amongst them, but I see no reason not to accept what Adv Brassey said in the contemporaneous memorandum.

[33] Meanwhile, Mr Pillay had wanted to resign, and there had been discussions, mediated by an intermediary, of the terms upon which he could do so, but they had been inconclusive. By 6 May 2014 however, soon before the disciplinary proceedings, agreement was reached, and Mr Pillay resigned. A 'separation and settlement agreement' was signed by him and SARS in which he agreed to resign with immediate effect. Included in the agreement was what was called a 'restraint of trade', in exchange for which he received payment of a sum equivalent to 18 months' salary.

The Resignation of Mr Richer

[34] Mr Peter Richer was employed by SARS from August 2003 to July 2006 and then again from July 2009 until he resigned in May 2015. He was Group Executive: Strategic Planning and Risk. From July 2014 to October 2014 he was Acting Chief Officer: Strategy, Enablement and Communications.

[35] Much the same happened to him as to Mr Pillay. The report of the Sikhakhane panel had made no suggestion that Mr Richer might have been implicated in any wrongdoing. Yet on 5 December 2014 Mr Richer was served a notice of suspension at the offices of Ms Kumalo, in the presence of Mr Lebelo, albeit that no reasons could be

given for his suspension, as Mr Richer recorded on the notice: 'unable to provide reasons at this time'.

[36] He, too, approached the Labour Court, and his suspension was withdrawn, only to be imposed again in January 2015. On that occasion allegations were put to him relating to the 'rogue unit' and he was invited to make representations, which he did, but they were rejected. Disciplinary proceedings were also commenced against him. Mr Richer resigned at the same time as Mr Pillay and on the same terms. Asked by the Commission to explain his resignation he said that it was 'in order to remain sane and to proceed with my life'.

The Resignation of Mr Ravele

[37] In November 2014, said Mr Ravele in evidence, he was summoned to Mr Moyane's office, where Mr Moyane 'came down on me like a ton of bricks', accusing him of being a weak leader, and saying he must choose where he stood, either with Mr Pillay or with Mr Moyane.

[38] For a while his relationship with Mr Moyane appeared cordial, but in early 2015, said Mr Ravele, he realised he was 'on his way out', when he attended a presentation, where he disputed some of the material that was presented. Sometime later he was summoned by Mr Moyane who said alleged criminal activity on his part was being investigated. A few days later a criminal complaint against him was laid at the instance of Mr Moyane.

[39] On 19 May he was called to the office of Mr Moyane and presented with a letter from the Hawks confirming that a criminal complaint had been laid against him, and he was told the investigation might take months, and that further charges might be made. Mr Moyane said he should expect to be suspended. The following day he was again

called to the office of Mr Moyane, where he was presented with a letter of suspension, and he resigned. He was asked to sign a restraint in return for which he was paid six months' remuneration.

The Resignation of Mr van Loggerenberg

[40] Mr van Loggerenberg was at one time Group Executive: Enforcement Investigations. The HRIU reported to him, and he reported in turn to Mr Ravele. I have related the circumstances in which he found himself being investigated, first by the panel chaired by Mr Kanyile, and then by the Sikhakhane panel, which made findings against him.

[41] Mr van Loggerenberg was suspended on 12 November 2014. On 15 January 2015 disciplinary proceedings were commenced against him. Meanwhile Mr van Loggerenberg had had to contend with relentless media articles humiliating him and advancing allegations to which his terms of employment prevented him from responding.

[42] By then he was considering resigning, and he conveyed that to Mr Moyane. He was asked to present a proposal in writing, which he did. He met once again with Mr Moyane, who insisted that he delete parts of the letter he had written, in which he had protested his innocence. He duly resigned on 4 February 2015, at the office of Mr Moyane, receiving the equivalent of six months' remuneration in return for signing a restraint. Mr Moyane insisted on a photograph being taken of the two shaking hands and smiling, and the resignation was cynically announced as amicable.

The Resignation of Mr Hore

[43] Mr Hore was recruited to SARS in 2005 to initiate the modernisation programme. Mr Hore clearly has exceptional skills in that field. He was at one time on the board of directors of the Nedbank group of companies and also headed its operations, employing some 10 000 people. He said he had reached a stage at which he felt he should move on in his career. By then he had met Mr Gordhan, who invited him to join SARS. Undecided, Mr Hore agreed to work for SARS for three months, without remuneration, at the end of which he and Mr Gordhan would decide whether he should stay. At the end of that period he agreed to stay, which he did until he resigned on 1 December 2014.

[44] His first role was that of General Manager of Strategy, Modernisation and Technology, his function being to develop and implement technology systems. In 2010 he was appointed Chief Officer: Operations.

[45] Mr Hore was one of those who was humiliated in the presence of his subordinates by Mr Moyane's announcement that he had no confidence in the members of EXCO and disbanded the body. Then Mr Moyane announced, in an internal communication to all employees, without having said a word to Mr Hore on the subject, that the modernisation process was suspended. Mr Hore said he soon realised that he would not be able to work with Mr Moyane, which is hardly a surprise, given that his work of a decade was suspended without even having been consulted, and he resigned on 1 December 2014 with effect from the end of January 2015. 'Goodbye Barry Hore ...', wrote Mr Franzen to Mr Massone on 3 December 2014, to which Mr Massone replied 'Now I'm scared by Tom.. This guy was supposed to be untouchable and it took Tom just a few weeks to make him resign.. Scary ..'

The Resignation of Mr Lackay

[46] Mr Adrian Lackay was employed at SARS for eleven years. He was spokesman for SARS, reporting to the Commissioner. He said after Mr Moyane arrived there was a systematic withholding of information from him, in consequence of which he found himself issuing media statements that he later realised were not true. He said the relationship between him and Mr Moyane started breaking down, and there were no regular interactions, albeit that SARS was in the headlines week after week. He said Mr Moyane seemed intent on not defending SARS in the media.

[47] By February 2015 Mr Lackay had been told he was no longer to speak on matters relating to employment, which would be dealt with instead by Mr Lebelo. In exasperation he resigned with effect from 19 March 2015.

[48] On 24 March 2015 he wrote a long letter, in confidence, to the chairman of the Standing Committee on Finance, which was handed on to the Standing Committee on Intelligence, conveying what was happening at SARS. That letter found its way into the public domain, and attracted the civil claim I refer to in Chapter 11.

[49] On 22 November 2018 Mr Yunus Carrim, chairperson of the Standing Committee on Finance, wrote to the Commission, in response to evidence of Mr Lackay that the Standing Committees had done nothing in consequence of his letter. Mr Carrim's letter is **Appendix 9**. We have noted his contention that parliamentary committees have no scope for intervening in matters of that kind. If that is so it reinforces our recommendation that the post of Inspector-General, who could intervene, must be created for SARS. It is not acceptable if intervention in what occurred is not possible even by parliamentarians.

[50] The evidence of what occurred at that time, both the oral evidence and that contained in many documents, of which the above is only a stark summary, has a distinct atmosphere of frenzy about the so-called rogue unit, in which even parliamentarians might have got caught up, much like the frenzy at the 'beast' in William Golding's 'Lord of the Flies'.

[51] Mr Lebelo calls it a 'media narrative' that Mr Pillay, Mr Richer, Mr van Loggerenberg and Mr Ravele were driven out of SARS. He says they all resigned because they feared the disciplinary proceedings they were facing, as he wanted to prove with his files and his affidavits. Perhaps that is correct, and for present purposes we will assume that to be so, but it misses the point. It is clear there was an intention at the outset to drive them out of SARS. That disciplinary proceedings might ultimately have achieved that purpose is neither here nor there. Of one thing they could all be sure from the start – there was no place for them at SARS.

[52] It is not helpful to view various events in isolation of one another to determine what occurred. Once put together, including what later occurred systematically to other employees of SARS, presents a clearer picture than isolated events. That Mr Moyane was bent on driving them out of SARS is consistent with all the facts. I also see no other inference that fits all the facts. Nor did it stop at driving them out of SARS. KPMG produced its first report only in June 2014, and its final report in September 2014. I see no explanation for KPMG continuing to trawl back to 2003 after the three had resigned, other than to find information upon which to discredit them. Just as Mr Moyane pursued, and even escalated, a grievance that had been lodged against Mr Hore, even though he had resigned, and then trawled back at great cost to discover whether there had been impropriety relating to the modernisation programme. It is also consistent with the pattern that followed for a year and more, as other employees were marginalised and resigned.

The Resignation of other Employees.

[53] Many other skilled and experienced employees resigned in the course of the next year or two, arising from what happened to them when the new structure of SARS was introduced. Some 200 employees were displaced from their jobs and were required to apply for positions in the new structure. A significant number who had been in management positions were rejected for alternative management posts, and found themselves appointed to supernumerary posts that had no job profile and no job content, ostensibly to avoid retrenchment, but in truth it was the departure lounge. Ms Kumalo, then head of human relations, wrote a long letter to Mr Moyane, complaining of what was occurring, without human relations being consulted, to which Mr Moyane's immediate response by email was a perfunctory 'No comment'. Later he replied in a formal letter serving no more than to refute what she had said.

[54] Some stayed, but others succumbed, and it can be inferred that was intended, for what rational employer places skilled employees in supernumerary posts with nothing to do? One who left was Ms Sunita Manik, the head of the Large Business Centre, which was fragmented in the new organisational structure. She is a Chartered Accountant, with certificates or diplomas in Management, Organisational Development, Education Training and Development, as well as Psychology. One day she arrived at work and was summarily removed from her position as head of the LBC, to be replaced by one of her subordinates, and from then she was assigned to an office where she was allocated no work. She applied for the post of Group Executive of Investigative Audit in the new structure. Albeit that she was the only candidate and met the criteria, she was not appointed. She said it was made clear to her that she could not expect a management position, and it was suggested she transfer to the SARS Academy, a post she had occupied when she had first joined SARS. In exasperation she ultimately resigned after 23 years' service to SARS.

[55] Some attempted to make themselves useful to other divisions. One was Ms Seremane. She joined SARS with a BA degree in 2009 as the executive for integrity

promotion, responsible for initiating and managing ethics and integrity initiatives. The new organisational structure demoted her role and she was put to the choice of being appointed a supernumerary 'domain specialist' or being retrenched. She questioned the process itself, and why integrity management was being downgraded, and where the position offered to her fitted into the organisation, and what it entailed, to which she received no meaningful response.

[56] Meanwhile, having been displaced from the position she had occupied, she found herself with nothing to do. At her own initiative she approached Customs and made a presentation on integrity management, which was enthusiastically received. She was told by Customs they had no capacity in her field and she was asked to develop an integrity programme. A few days later she was dismissed, with a retrenchment payment of R425 112. We recommend that an integrity unit at a high level be established again.

[57] We have received other accounts in similar vein, both in oral evidence and by affidavit. We think it is clear that to be assigned to the post of 'specialist', whether it be 'domain specialist', 'principal specialist', or even 'generic specialist', as the supernumerary posts were called, was to be assigned to the departure lounge. While some resigned, others have hung on, to the benefit of SARS when there is a new regime, their skills and experience meanwhile going to waste.

[58] One is Dr Malovhele, who joined SARS in 2005, and is now in a supernumerary post. He has a BA degree, an MBA and a PhD and headed the compliance division. This is what happened to him:

'Then later on I was then informed that I am misplaced. I'm no longer having a role, you know. And I couldn't understand it and if I take you back when the new operating model was being spoken about three individuals, different individuals, they came to me and said, Thabelo, don't expect to have any management position in the new administration.

And you know, I laughed it off and to say no, it can't happen to me. It can't happen to me. You

know, I've been around here and it can't happen. But when I was told that I was [affected] I realised that, you know, what I was told was the truth.'

[59] A former staff member who had been in his unit, described events in similar terms in an affidavit and concluded as follows, with which Dr Malovhele agreed:

'Fear had gripped the organisation and staff were too scared to ask any questions. I believe that the lack of communication was an intentional manoeuvre by the leadership to create havoc and disharmony so that the targeted affected people would leave SARS.'

[60] Yet another is Dr Jozua Loots who, prior to the new operating model, worked in the LBC as an executive responsible for high net worth individuals, large corporate revenue analysis and forecasting, corporate intelligence, and corporate tax compliance risk. Mr Loots has a Ph.D in Business Administration, his thesis being on transfer pricing, a new and critically important area for tax authorities. He found no place in the new structure, and is now in a supernumerary position, confined to desktop research.

[61] Dr Carolissen described the consequences of what happened to people at SARS:

'At the risk of sounding dramatic I think what we see is typical post-traumatic effects of a severely traumatic event that we went, well that SARS had gone through, that even those people that were appointed subsequently in the new structure even we felt like we suffered from survivor syndrome and that the people that we used to work with that were not appointed, the relationships were strained. There's no doubt about it. So this is typical of an organisation that has gone through severe trauma, the symptoms that you are describing'.

[62] Public servants who succeed to other public servants in public institutions do not drive out the public servants who remain, whether brutally or by forcing attrition, which occurred in this case. These are indeed institutional factors affecting the performance of SARS in all its areas of operation. Governance breaks down when management is thrown into disarray.

[63] We have heard it said that since the removal from office of Mr Moyane, former employees of SARS have volunteered to return to assist in its rehabilitation. No doubt there are others with experience and skills who might yet be attracted to return to employment at SARS. We recommend that the new Commissioner of SARS evaluates employees in supernumerary posts, and considers their placement in positions in which they are able to add most value to SARS. We recommend as well that posts in the establishment be evaluated and, where appropriate, active steps be taken to recruit former employees to those posts. In addressing the Commission, the acting Commissioner of SARS rightly apologised unreservedly for the damage done to employees and former employees during the period under inquiry. We recommend that SARS consider possibilities for reparation, not necessarily in pecuniary terms.

CHAPTER 7: THE NEW EXCO

[1] By about the middle to latter part of 2015 EXCO had been denuded of virtually all the management experience and skills that had existed when Mr Moyane arrived. Mr Hore, Mr Pillay, Mr Richer and Mr Ravele had all resigned. The contract of Mr Head had come to an end, and after a short extension he had left. Ms Kumalo had retired.

[2] By the middle of 2017, after the restructuring, nothing was left of the former EXCO. Mr Matsobane Matlwa had been appointed Chief Officer: Finance with effect from 19 December 2014. Mr Jonas Makwakwa was appointed Chief Officer: Business and Individual Tax, with effect from 1 November 2015. Mr Hlengani Mathebula was appointed Chief Officer: Strategy and Communications with effect from 1 January 2016. Mr Teboho Mokoena was appointed Chief Officer: Human Capital and Development with effect from 2 January 2016. Mr Jed Michaletos was appointed Chief Officer: Customs and Excise with effect from 4 January 2016. Ms Refiloe Mokoena was appointed Chief Officer: Legal Counsel with effect from 1 May 2017. Ms Mmamathe Makhekhe-Mokhuane was appointed Chief Officer: Digital Information Services & Technology with effect from 1 May 2017. Ms Mogola Makola was appointed Chief Officer: Enforcement with effect from 1 July 2017.

[3] Mr Makwakwa had been employed at SARS for some years. Mr Matlwa and Mr Mokoena had been employed by SARS before. The others were all recruited from outside SARS. The institutional memory of SARS at a senior level was almost entirely eradicated.

Appointments Under the Initial Appointment Policy

[4] The Human Resources Internal Policy on Recruitment and Selection as it existed on 1 April 2014 provided that SARS must endeavour to grow from within but the

services of executive search agencies may be contracted from time to time for recruitment at leadership level. Candidates for appointment were to be shortlisted by screening 'based on the minimum requirements of the job and the requisite culture and values'.

[5] Formal interview of candidates was required by 'reasonable cross functional teams, representative of the functional department'. Selection for appointment had to 'take into consideration the weighted outcomes of the following, namely, interviews, psychometric assessments, case studies, employment equity, pre-employment screening, adherence to SARS values and reference checks'.

[6] For roles from Grade 6 'applicable psychometric related assessments' were compulsory. The psychometric assessment scored candidates in three weighted areas, and divided the total score into three categories: '80 and above: highly recommended; 70 – 79 recommended; 0 – 69 development required'.

Mr Matsobane Matlwa

[7] Mt Matlwa was appointed under that regime. He was self-employed at the time, but was a Chartered Accountant and had been CEO of the SA Institute of Chartered Accountants. He had been interviewed for the position before Mr Moyane was appointed, and had been rejected, but was interviewed once again. On this occasion, according to the application to the Minister of Finance for approval of his appointment, he was interviewed by a panel comprising Mr Moyane; Ms Kumalo, Chief Officer: Human Relations; Mr Takalani Musekwa: Executive Employment Equity; Mr Moeketsi Shai, member of the SARS Committee on Human Relations; and Ms Auguste Coetzer, a director of Talent Africa, who had recruited Mr Matlwa. The outcome of his psychometric assessment was that he was not recommended for appointment. He was nonetheless recommended to the Minister for appointment, which the Minister approved on 11 December 2014.

[8] The selection policy required the selection panels to be 'reasonable cross functional teams, representative of the functional department'. It is not apparent to me that the panel was representative of the functional department, nor that it had any financial experience of a large organisation. Moreover, it is most unusual for the recruitment agent, who had a clear conflict of interest, to be on the selection panel.

Mr Jonas Makwakwa, Mr Jed Michaletos, Mr Teboho Mokoena, Mr Hlengani Mathebula

[9] The next four appointments were made simultaneously, following recommendations made by Mr Moyane to the Minister of Finance on 5 October 2015, which were approved by the Minister on 28 October 2015. All the appointees were interviewed by a panel comprising Mr Moyane, Mr Rudolph Mastenbroek, and Mr Meta Maponya, both described in the document addressed to the Minister as members of the then newly established SARS Advisory Board.

[10] Mr Jonas Makwakwa was Group Executive: Audit, and was acting Chief Officer: Operations since the resignation of Mr Hore. Before that he had been Operations Manager, then National Operations Manager: Enforcement. His tertiary qualifications were a Bachelor of Commerce in Accounting, a Certificate in Business Management, and he had undergone a Global Executive Programme. The application for approval of his appointment as Chief Officer: Business and Individual Tax, recorded 'outstanding' under the heading 'assessment'. If that signified to the Minister that the candidate was meritorious, he was wrong. What it meant was that the outcome of the assessment, which had been carried out on 2 October 2015, had not been received. As it turned out, the assessment was that Mr Makwakwa 'may need development'. He was appointment at a remuneration of R3 700 000 per annum, slightly above the maximum remuneration in that salary range.

[11] Mr Jed Michaletos was appointed Chief Officer: Customs and Excise. He was at that time a 'Partner/Director' of Deloitte, with customs experience. His tertiary qualification was Bachelor of Commerce in Financial Accounting. In the application to the Minister his assessment was also listed as 'outstanding'. He was assessed as 'requires development'. He was appointed at a remuneration of R3 598 656 per annum.

[12] Mr Teboho Mokoena was appointed Chief Officer: Human Capital and Development, at remuneration, according to his letter of appointment, of R3 million. Immediately before his appointment he was Chief Deputy Commissioner: Human Resources, at the Department of Correctional Services, and had held that position since 2012. His tertiary qualifications were B. Juris, Certificate in Organisational Development, a Diploma in Human Resources Management, he had attended a Management Advancement Programme, and he had a post graduate Diploma in Executive Development. His assessment, too, was recorded as 'outstanding'. He was also found to 'require development'.

[13] At the time of his appointment as Chief Officer: Strategy and Communications, Mr Hlengani Mathebula was Head of Group Strategy and Communications at the Reserve Bank, where he had been employed for 10 years. Before that he had occupied various positions in banking. He has the degrees Bachelor of Arts, Bachelor of Theology (honours), has undergone a management development programme, and has a Certificate in Marketing Management. The outcome of his psychometric assessment was 'Highly Recommended'. He was appointed at a remuneration of R3 598 656.

[14] On the face of it there are extraordinary features of the appointments of Mr Makwakwa, Mr Michaletos, Mr Mokoena and Mr Mathebula. No doubt Mr Mastenbroek and Mr Maponya have expertise in their respective fields, but I don't see how panels comprising the Commissioner and the two members of the advisory board, can be said to have constituted 'reasonable cross functional teams, representative of the functional department', across all the functional fields of business and individual tax, strategy and communications, human relations, and customs and excise. Moreover, one should

expect selection of the most senior members of management to be adjudicated by a far larger complement of skills and backgrounds than were brought by only the Commissioner and two members.

[15] Another extraordinary feature is that none of the appointees, other than Mr Mathebula, was recommended for appointment by psychometric assessment. In each case the assessment was 'required development'. Indeed, in all three cases the outcome of the assessment was not known at the time recommendations were made for their appointment, but was listed as 'outstanding', notwithstanding that the policy made psychometric assessment compulsory.

Appointments under the new Selection Policy

[16] A new Human Capital and Development Internal Policy Recruitment and Selection Policy for SARS was approved by Mr Moyane, on the recommendation of Mr Mokoena, on 31 March 2016. There were two significant changes. The shortlisting policy required screening of candidates 'based on the minimum requirements of the job as well as divisional Employment Equity requirements'. In contradiction, however, both those requirements were now only factors to be taken account of in selection. The Policy provided that

'selection for appointment of candidates must take into consideration the weighted outcomes of the following, namely, minimum job requirements as per the approved job profile, interviews, psychometric assessments, case studies, employment equity, pre-employment screening, adherence to SARS values and reference checks'.

[17] Formal interviews were again compulsory in the selection process, to be conducted by 'reasonable cross functional teams, representative of the functional department and must consider diversity where practically possible'. For Grade 6 and above 'psychometric related assessments' were compulsory.

[18] At about the same time a new SARS Qualifications Framework was adopted to coincide with the restructuring. Amongst other things it set 'minimum qualification requirement guidelines' and 'minimum years of experience guidelines'. For the position of Chief Officer (Grade 9B) the 'minimum qualification requirement guideline' was 'relevant postgraduate Master's degree in specified area (i.e. Law, Tax) and/or post graduate qualification in business management (MBA/MBL) and/or professional registration for example CA (SA)'. The minimum 'years of experience guideline' was '18+ years' experience in a similar environment, of which 8 – 10 years ideally at executive management level'.

Ms Refiloe Mokoena, Ms Mmamathe Makhekhe-Mokhuane, Ms Mogola Makola

[19] Ms Refiloe Mokoena, Ms Mmamathe Makhekhe-Mokhuane, and Ms Mogola Makola were interviewed for appointment as Chief Officer: Legal Counsel, Chief Officer: Digital Information Services & Technology, and Chief Officer: Enforcement, respectively.

[20] Ms Makhekhe-Mokhuane's credentials according to the application to the Minister I refer to below were the following:

Work History:

2002-2004 Chief Information Officer: Department of Transport
 2004 – 2005 Chief Information Officer: Department of Communications
 2006 – 2013 National Provincial Chief Information Chief Officer (North West Province Government)
 2013 – current: Chief Information Officer: Department of Water and Sanitation.

Tertiary Qualifications

1997 Diploma Business Management
 1999 Advanced Project Management
 2000 Information Technology Management
 2004 MBA

Assessment: Development required

[21] She was interviewed for the position on 21 June 2016, by a panel comprising Mr Moyane, Mr Zach Modise: National Commissioner: Department of Correctional Services, Mr Lionel October, Director General: Department of Trade and Industry, retired Lieutenant General Solly Ngubane; and Ms Coetzer from Talent Africa. Mr Mokoena attended as an observer.

[22] On 21 July 2016 Mr Moyane sought approval to appoint Ms Makhekhe-Mokhuane from then Minister of Finance, Mr Gordhan. It appears the documents went astray, because the application was replied to, with apologies, on 15 December 2016. The Minister pointed out that while the Commissioner decides on who to appoint to a post, the Minister must approve the terms and conditions of employment. He asked for a copy of her proposed contract, and added the following note: 'In addition to the above the panel of interviewers did not have anyone with IT experience.'

[23] Mr Moyane replied on 11 January 2017, enclosing a copy of a standard contract. He added that the interviewing panel had included retired Lt General Ngubane, and detailed his IT experience. While he certainly had wide experience, he naturally had had no exposure to the SARS systems.

[24] Ms Refiloe Mokoena's credentials were listed as follows:

Work History:

It is unclear from the application what her position was at the time of appointment. Her 'current employer' was said to be Telkom (Pty) Ltd, but under 'career history' appeared '1991 – date Mageza Raffee Mokoena Inc Attorneys', and also 'March 2016 – date Acting judge'.

Tertiary Qualifications:

1985: Bachelor of Arts. Bachelor of Laws (B. Juris)

1987: Bachelor of Laws (LL. B)

2010: Master's in Business Administration (MBA). (Currently busy with dissertation).

It is difficult to discern whether in 1985 she obtained a B.A., an LL.B. or a B.Juris, as she couldn't have acquired all three. It is also difficult to see how an MBA would have been awarded if the dissertation was yet to be completed, but none of that seems to have been queried.

Assessment: Development required

[25] Ms Makola's credentials were listed as follows.

Work History:

She joined Bowman Gilfillan as a candidate attorney in 2001, spent a year on an exchange programme in New York, and at the time of appointment to SARS she was described as 'Partner in Tax Practice Group (Corporate Department)'. Her position was described as amongst 'six partners in the Tax Practice Group. Managing a staff complement of 10 to 14 personnel. Works across the divisions in Kenya, Uganda, Madagascar and Botswana'.

Tertiary qualifications:

1998 Bachelor of Arts
2001 Bachelor of Laws
2005 Masters in Law (Tax)

Assessment: 'Development Required'

[26] Both were interviewed by a panel comprising Mr Moyane, Mr ME Moemi, Director General: Sports and Recreation, Adv Eric Mkhawane (CEO: Tax Ombud); and Ms Coetzer of the recruiting agency, Talent Africa. Mr Mokoena was present as an observer.

[27] On 14 and 28 February 2017 respectively, Minister Gordhan was asked to approve their appointments, but that had not been done at the time he was replaced as Minister of Finance.

[28] Soon thereafter Mr Moyane must have decided he did not need ministerial approval for appointments, because on 24 March 2017 Ms Mokoena and Ms Makhekhe-Mokhuane were appointed to their respective positions by letter from Mr Moyane.

[29] On 3 April 2017 Mr Teboho Mokoena advised Mr Moyane that Ms Makola had declined the offer of the position and requested a renegotiation of her salary package. He recorded that she had indicated 'an expectation of R3.7 million', and he recommended offering R3 410 000, which Mr Moyane approved on 10 April 2017. Ms Makola was duly appointed by letter from Mr Moyane dated 18 April 2017.

[30] On 6 April 2017, on the recommendation of Mr Mokoena, Mr Moyane wrote to the Minister of Finance, who by then was Mr Gigaba, asking him to 'note' the appointments. He did so in the following terms (a copy of the memorandum is **Appendix 10**):

'The purpose of this memo is for the Minister to take note of the appointment of three Chief Officers: Mogola Tsibugo Makola as Chief Officer: Enforcement, Refiloe Mokoena as Chief Officer: Legal Counsel and Mmamathe Makhekhe-Mokhuane as Chief Officer: Digital Information Services & Technology, in accordance with section 5(1)(a) and 18(3) of the SARS Act; and section 4 of the legal opinion provided by Byron Morris, especially paragraph 4.19 of that legal opinion, paragraphs 21 to 28 of the legal opinion provided by Wim Trengove SC and Kate Hofmeyer, and paragraphs 52 to 54 of the legal opinion provided by Vincent Maleka SC and Ndumiso Nxumalo (see attached).'

[31] Apart from the fact that Ms Makola had not yet been appointed, the memorandum presents only part of the picture and is misleading. I am not able to locate the opinion of Mr Morris, but the other opinions were that the Commissioner of SARS indeed has the power to select managerial employees, but what the Minister was not told was that both opinions were to the effect that the terms and conditions upon which they are appointed required the approval of the Minister, as Mr Gordhan had said in his earlier letter.

[32] Adv Trengove SC and Adv Hofmeyer said the following on 4 February 2016:

‘27. Section 18(3) provides that the Minister must approve the terms and conditions of employment for any class of employee within the management structure of SARS. The Act does not define what the management structure of SARS is. “Management” is defined in the Oxford English Dictionary as “the responsibility for and control of a company or similar organisation”. If this definition is applied, the employees in the management structure of SARS would be those who have responsibility for and exercise control over the institution. The terms and conditions of employment are the entire contract of employment between SARS and the employee’.

[33] The opinion of Adv Maleka SC and Adv Nxumalo, given on 29 February 2016, was even more explicit:

‘50. Our interpretation of section 18(3) of the SARS Act leads us to conclude that the Minister cannot dictate to SARS to employ or not to employ a specific individual. The Minister’s role, as we conceive it, is limited to a consideration and approval of the terms and conditions of employment for the class of employees who fall in management structure of SARS.

51. ...

52. We have already pointed out that the powers of SARS include the appointment of its employees, and the determination of their terms and conditions. That primary power is expressly set out in section 5(1)(a) of the SARS Act.

53. The additional requirement of ministerial approval arises in respect of employees in the management structure of SARS. In respect of that class of employees, the employment of such employees and their terms and conditions of employment will not become effective until the Minister approves them in terms of section 18(3) of the SARS Act.

54. It follows that it is SARS first who recruits and employs, and determines the terms and conditions of its employees. Persons appointed in the management structure cannot commence their employment until the Minister approves the terms and conditions ... ‘.

[34] On 12 May 2017 Mr Mokoena recommended to Mr Moyane that the remuneration at which Ms Refiloe Mokoena and Ms Mmamathe Makhekhe-Mokhuane had been appointed, being R2 207 078, should, at their request, be increased by 42.23% to R3 139 126. That was approved by Mr Moyane the following day. The motivation

was said to be that they should be 'put on par with other internal employees on the similar role'. The increase in the remuneration of the three appointees placed them on approximately the same level as the other Chief Officers. It is concerning that salaries could be increased so significantly just for the asking. Mr Mokoena motivated his recommendation on no more than that they should be on par with the other chief officers. If the appointees were aggrieved that their remuneration was not on a par with that of other chief officers, they ought not to have taken the appointments in the first place. That is not a rational basis for arbitrary increases to be granted.

[35] Once again there are extraordinary features of these appointments. On the face of it none of the members of the interviewing panel for Ms Makola appears to have had functional experience in tax collection enforcement. The panel for the appointment of Ms Makhekhe-Mokhuane appears to be remarkable for a candidate whose function would be to take charge of SARS' multi-billion rand information technology systems. Information technology at SARS is not confined to servicing the core-business. It is the very heart of SARS' core-business. Only one on the panel had qualifications in information technology, but there was none with exposure to the SARS technology. Moreover, her qualifications and experience bear little relationship to the complex information technology she would be required to manage. I have difficulty seeing how these panels could be said to have been a 'reasonable cross functional team, representative of the functional department', with sufficient diversity of experience and skills to appoint top management of a large and complex organisation.

[36] It needs to be borne in mind that appointment at EXCO level carries wider duties than those of their specific portfolios. EXCO operates as an advisory body to the Commissioner in relation to the organisation as a whole. None of the appointees appear to have had the management experience required for management of an organisation employing 14 000 people. The guideline for appointment at that level was '18+ years' experience in a similar environment, of which 8 – 10 years ideally at executive management level'. Managing 12 – 14 employees in an attorneys' practice, for example, does not come near to that.

[37] I have observed that these appointments were made by Mr Moyane, without ministerial approval. He asked only for them to be 'noted' by the Minister. The basis for that was said to be opinions furnished by Byron Morris, Advocates Trengove SC and Hofmeyer, and Adv Maleka SC and Ndumiso Nxumalo, in relation to the effect of sections 5(1)(a) and 18(3) of the SARS Act. I observed earlier that I have not been able to locate the opinion of Mr Morris, but the other two opinions advised the Commissioner, explicitly, that while he was entitled to select managerial staff, their terms and conditions of employment required the approval of the Minister, and that must have been known also by Mr Mokoena. In these cases there was no such approval of the terms and conditions upon which they were appointed. Moreover, there was no approval for the increase in their remuneration. I have no reason to doubt the correctness of the two opinions, in which case the appointment of all three was irregular, and their employment was unlawful.

[38] In response to an invitation by the Commission to furnish submissions on why the Commission should not find the appointments to have been unlawful, Mr Mokoena submitted an affidavit, which I have found to be disappointing, because the responses are all an exculpatory afterthought.

[39] He said the Minister had 'noted and approved' the appointments. That is not correct. The memorandum did not ask for ministerial approval for the appointments, as Mr Mokoena well knows. It asked only that the appointments be 'noted'. Indeed, Ms Mokoena and Ms Makhekhe-Mokhuane had already been appointed at the time the memorandum was placed before the Minister. Mr Mokoena sought also to justify the lawfulness of the appointments on the grounds that the Minister had raised no queries in relation to what was placed before him. It is unfortunate that a senior employee of SARS should justify misleading information being placed before the Minister on the basis that it was not queried.

[40] So far as their remuneration was thereafter adjusted, Mr Mokoena submitted that 'SARS can effect adjustments within salary ranges previously approved by the

Minister', but gives no explanation for that view. Ministerial approval is required for all terms of employment, not only those upon which the employee was first appointed. It would be absurd if approval was required for the initial terms, which may then be altered the next day. Mr Mokoena has not persuaded me that the appointment of all three Chief Officers was not unlawful. Indeed, that was what he and Mr Moyane had been told in the opinions I have referred to, but they went ahead nonetheless.

[41] Ms Makhekhe-Mokhuane asked to give evidence before us. The evidence she gave, and the manner in which it was given, was rather disturbing, coming from the Chief Officer in charge of SARS information technology systems. In the fifteen months of her tenure only one strategy meeting has been held. Of the eleven meetings with her subordinates she attended only four, appearing to see the absence of her signature on the minutes of the other meetings as significant, for reasons that are not clear to us. There has been no material development of the information technology systems since the departure of Mr Hore, and all that is being done, so she said, is to 'keep the lights on'. We think it is manifest that she does not have the capacity to take control of SARS information technology. The aggressive, indecorous and unusual manner in which she gave evidence before the Commission was also not appropriate for a person in her position at SARS.

General

[42] I have noted that psychometric assessment for appointment at this level is compulsory and I think the intention is self-evident. It is intended as an objective benchmark for assessing the candidate's capacity for the position, albeit that that is not decisive. The most remarkable feature of all the appointments, other than that of Mr Mathebula, was that in no case, upon psychometric assessment, which was compulsory, was the appointment recommended. Indeed, the fact that in three cases the outcome of the assessment was not yet available shows that assessments were ignored in the selection process, in conflict with the dictates of the policy. I find it troubling that an

organisation as large and complex as SARS has been under the management of chief officers all but one of whom was objectively assessed as 'requiring development'.

[43] As troubling is the size and composition of the interviewing panels. The policy required selection by 'reasonable cross functional teams, representative of the functional department'. It is not evident to me that any of the panels fell within that category. The mechanisms for selecting top management are themselves important elements of governance, and panels comprising no more than the Commissioner and two others seem to us to be wholly deficient for that purpose.

[44] Good governance calls for senior management with the capacity to restrain abuse of authority but we see no sign of that in those who were appointed by Mr Moyane. Mr Mokoena sought to demonstrate that he had not been compliant by directing the Commission to a reprimand he received from Mr Moyane in consequence of a letter he wrote opposing the return to SARS of Mr Makwakwa after he had been suspended, but I do not find that to be persuasive. The letter was not written to Mr Moyane, but to a firm of attorneys, and came fortuitously into Mr Moyane's hands. We have not seen evidence of anything but complacency from the members of EXCO appointed by Mr Moyane.

[45] Chief officers at SARS receive substantial remuneration, generous bonuses, and are surrounded by bodyguards and highly paid executive assistants. No doubt any confrontation with Mr Moyane would have cost them all that, but compliant senior management is a large step towards dismantling governance.

[46] The reason the Katz Commission recommended remuneration at SARS in excess of that in government service was to enable SARS to attract the best, and we recommend that the new Commissioner consider whether that was achieved, by conducting a performance review of EXCO members appointed by Mr Moyane, taking account of their capacity for senior management, their appreciation of good governance,

and their capacity for inspiring public confidence in the integrity of SARS, bearing in mind these and other matters dealt with in this report. We also recommend that the new Commissioner review the benefits that are accorded to members of EXCO.

[47] For completeness I need to add that at 31 March 2018 Mr Matlwa, Mr Makwakwa and Mr Michaletos had resigned. At the time of this report Ms Refiloe Mokoena was on suspension and Ms Makola had resigned. .

CHAPTER 8: THE ANTI-CORRUPTION AND SECURITY UNIT AND RELATED EVENTS

[1] Before the restructuring the Anti-Corruption and Security Unit (ACAS) functioned to combat internal corruption at SARS. In 2010 it was audited by the Department of Public Service and Administration and was found to be the best anti-corruption unit of 85 government departments. Again in 2013 it was the subject of a peer review and scored in the top bracket for each of its functions. A witness who gave evidence in public hearings in relation to the unit asked not to be named, and I refer to the witness only as 'the witness'.

[2] On 18 December 2014 an internal communication from the Commissioner announced that the principal functions of ACAS were to be positioned within other business areas, the effect of which was that the unit was effectively disbanded. On 31 December 2014 an email was sent by HR to the managers of the various teams announcing new reporting lines. This was said to be for an interim period pending an overall review of the organisational structure.

[3] Under the new structure the unit came to be known as Fraud Investigations, comprising internal investigations, risk analysis and forensic audit, reporting to the Group Executive: Internal Audit, which undermined its very function of independence. Before ACAS had investigated major cases concerning allegations of collusion between SARS employees and syndicated crime. After the changes members of the unit, then operating as Fraud Investigations, were relegated to dealing with minor investigations, like forged medical notes, fraudulent mileage claims, and so forth.

[4] Mr Hlengani Mathebula, Chief Officer: Strategy and Communications, was appointed acting Chief Officer: Enforcement on 1 February 2016, a position he held until Ms Mogola Makola was appointed to that permanent position with effect from 1 July 2017. In September 2016 members of the unit were told that henceforth they would report to Mr Mathebula.

[5] By then Mr Yegan Mundie, who had been an investigator in the unit, had been transferred to the office of the Commissioner, forming part of a group that came to be known as the Tobacco Task Team, who seem never to have investigated the illicit tobacco trade, but investigated instead investigators of the trade. When queried, the managers of the former ACAS were told by Mr Mathebula that it had been the Commissioner's decision.

[6] Mr Mathebula said in evidence that on one occasion (the date was not specified) Mr Moyane called him to his office and gave him a list of people he should either dismiss or suspend and investigate, who included Mr Yousuf Denath and Mr Kumaran Moodley in Fraud Investigations. He said he asked for time to consider. A day or two later he returned to Mr Moyane and said he was uncomfortable with investigating people with no information of what they were alleged to have done, and in this instance he was not willing to do so. Why he should even have thought of doing so is cause for concern itself.

[7] In about June 2016 Mr Denath received information that the State Security Agency was in possession of a lawfully intercepted conversation between Mr Mundie and a reputed tobacco smuggler in which, it was said, Mr Mundie disclosed information about competing taxpayers, and of SARS officials engaged in enforcement operations. Mr Denath met with Mr Moyane, Mr Mathebula and his manager and asked for urgent steps to be taken against Mr Mundie.

[8] According to Mr Mathebula, he was asked by Mr Moyane to resolve the matter, and he asked Mr Denath to obtain the intercept. Mr Denath returned to say the State Security Agency was unwilling to furnish it other than at the request of Mr Moyane. The email conveying that was taken by Mr Mathebula to Mr Moyane to which Mr Moyane responded that he 'doesn't deal with junior people'. There the matter rested, said Mr Mathebula at first in his evidence, though later he said Mr Moyane told him in a telephone conversation that he would take the matter up with the Director-General. For

that reason, said Mr Mathebula, it was his view that his involvement in the matter had ended and that there was nothing further for him to do.

[9] On 10 August 2016, Mr Mundie sent an internal memorandum to Mr Mathebula, the stated purpose of which was to allege that SARS investigators were acting unlawfully so as to provide an unfair advantage to British American Tobacco (BAT). In effect, he alleged that SARS investigators were collaborating with BAT's security company, Forensic Security Services, to undermine other participants in the tobacco industry, including some reputed to be engaged in organised crime. The memorandum recommended, amongst other things, that SARS investigate its own investigators, including Mr Denath and Mr Kumaran Moodley.

[10] Mr Mathebula signed the memorandum in support of the recommendations. Mr Mathebula sought in his evidence to distinguish support for the recommendations from authorising the recommended action, on the basis that the persons concerned did not report to him but to the Commissioner, though the relevance of the distinction escapes us in the present context. The point is not whether he authorised the proposed action but whether he was agreeable to it being taken, which clearly he was.

[11] Mr Mathebula also emphasised that what he supported was investigations, and no disciplinary action being taken against Mr Denath. With regard to Mr Moodley, he said that he was not involved in or even aware of disciplinary action against him. The fact remains that, under his watch, two of SARS' key criminal investigators were suspended and disciplined on the basis of what turned out to be trumped up charges at the instance of a man whom Mr Mathebula knew the State Security Agency suspected of colluding with crime. SARS recently restored both Mr Denath and Mr Moodley to their positions.

[12] Sometime between 10 August 2016 and 1 September 2016, Mr Mathebula received another memorandum from Mr Mundie, the stated purpose of which was to request authority from senior management for certain SARS employees to work on a team established by the SAPS with a dedicated investigative capacity to investigate the high levels of corruption and fraud in the tobacco industry. Mr Mundie claimed there was a syndicate, including SARS officials, that victimised the competitors of BAT, by using state resources for illegal searches, audits, raids and intercepts. Mr Mundie identified five SARS employees who should join the SAPS team. He also asked Mr Mathebula for urgent approval for certain resources to be made available, including pool vehicles and a safe house. Mr Mathebula signed his support for the requests, though he said he overlooked the request for a 'safe house' when he signed the document. Again, he said, he supported rather than approved the requests, as it was the Commissioner who was in control of 'the functional aspects' of the task team.

[13] Mr Mathebula's further evidence concerning that memorandum was nothing short of bizarre. He said he approached Mr Moyane and told him he was uncomfortable signing the memorandum because Mr Mundie and the Tobacco Task Team reported to Mr Moyane. He said the memorandum 'went back and forth' and he made changes to it. Why the memorandum went 'back and forth' and what changes Mr Mathebula made were not explained in his evidence. However, he said he was 'comfortable' with the version he finally signed, but for its reference to a safe house which, he said, he overlooked.

[14] He said Mr Moyane pleaded with him over a two-week period to sign the memorandum. Why the pleas were necessary was not explained. Ultimately Mr Moyane approached him and said he must leave the offices with him and must leave his cell phone behind, and they walked to Mr Mathebula's vehicle, where Mr Moyane told him he must sign the memorandum. Mr Moyane told him he was amongst people who knew where he (Mr Mathebula) and his kin resided, which, said Mr Mathebula, 'sent a chill down my spine that day because it appeared a very ominous threat...'. Mr Mathebula then signed the memorandum on 1 September 2016. He said he never

reported the incident to anyone as there was no reason for him to do so, given that the Commissioner was the 'functionary' and he provided 'administrative support', but that misses the point. If a member of EXCO does not appreciate that something fishy is going on when the Commissioner of SARS insists on a meeting in his car, and insists he must sign a document against his will, because there are 'people' who wish him ill, then he lacks the vigilance that should be expected at that level of seniority.

[15] On 24 October 2016 Mr Gobi Makhanya sent an email to Ms Carol van Wyk, copied to Mr Mathebula, requesting permission to download emails from the SARS server. At that time Mr Makhanya was not even part of the Tobacco Task Team but was in debt management in KwaZulu Natal. Listed were a number of people within SARS, primarily those who had previously investigated the illicit cigarette trade, but also people outside SARS, including the head of the Special Investigating Unit, and a person from the office of the public protector. Much of that was sensitive information including the identities of whistle blowers and their reports. Mr Mathebula approved the request. He said in his evidence that he did not know whether it was lawful to download emails and made no inquiries to establish whether it was indeed lawful. He couldn't say why the emails of people outside SARS, for example the head of the SIU, were to be downloaded.

[16] In response to an invitation by the Commission to furnish reasons why the Commission should not make certain findings, Mr Mathebula sought to justify his conduct on the basis that SARS's internal policies allow for SARS to monitor its employees' communications, which seems to be an afterthought, but in any event it does not give him carte blanche. It was a violation of the privacy of the individuals and he ought not to have supported it without proper and lawful cause, nor ought he to have done so when he did not know whether it was lawful, which he said he did not. And certainly it was a violation of his duties as a senior member of management to approve the downloading of emails of people who did not work for SARS.

[17] In November 2016 senior managers in Fraud Investigations, being the witness and Mr Yousuf Denath, were called to a meeting and told, without explanation, that the Tobacco Task Team was henceforth to be housed within Fraud Investigation, though would continue to report to the Commissioner.

[18] Meanwhile, the group was operating without due governance. Beforehand there had been strict governance, requiring cases to be registered, and separating case allocation from case investigation, but that was not observed by the Tobacco Task Team. The one thing the Tobacco Task team did not investigate was the illicit trade in cigarettes, but investigated instead the investigators who once investigated that trade. The investigation of SARS officials suspected of corruption should have fallen within Fraud Investigation, as that was the unit mandated to tackle internal corruption. The net effect of the restructuring and re-allocation of responsibilities, in other words, was that the internal corruption unit dealt only within minor transgressions; the Tobacco Task Team investigated SARS investigators who had investigated the illicit trade in cigarettes; and the units that investigated the illicit trades ceased to exist.

[19] In April 2017 the former members of ACAS (now part of Fraud Investigations) were advised that Mr Gobi Makhanya from the Tobacco Task Team had been appointed acting Executive of Fraud Investigations. The day after his appointment Mr Denath was suspended by Mr Makhanya. Mr Denath remained on suspension for a year and three months, before he was cleared by a disciplinary hearing conducted under an independent advocate, who described the charges, relating to events that had occurred five or six years earlier, as a sham. The inquiry cost SARS about R3 million in legal fees.

[20] On 11 November 2016, the Senior Manager of Criminal Investigations, Ms Ronel van Wyk, addressed a memorandum to Mr Mathebula, copied to Adv Neo Tsholanku, Group Executive: Criminal Investigations, dealing with an allegation made by Mr Paul O'Sullivan that Mr Mundie had been in a corrupt relationship with a taxpayer. Ms van Wyk said SARS' criminal investigators had made preliminary finding to the effect that Mr Mundie had facilitated the taxpayer receiving substantial refunds on the basis of

fraudulent VAT claims in exchange for a payment of R9m. She outlined the evidence that she considered supported the allegations, and recommended that the case be referred to SARS's Internal Investigations to investigate the alleged conduct of Mr Mundie. She further recommended that SARS contact the SAPS official involved in the case and that the matter be handed over to the NPA.

[21] Two days later, on 13 November 2017, Adv Neo Tsholanku addressed a memorandum to Mr Mathebula. The content of the memorandum is identical to that of the memorandum Ms van Wyk had written, except that the recommendations are quite the opposite. Notwithstanding the analysis of the evidence by Ms van Wyk in the body of the memorandum, Adv Tsholanku recommended that 'there is no prima facie evidence to suggest the involvement of Mr Yegan Mundie in illegal activities'. Mr Mathebula approved Adv Tsholanku's recommendation, without having returned to Ms van Wyk to obtain her views, his explanation being no more than that he accepted Adv Tsholanku's view.

[22] In the murky world suggested by the events above, and the incomplete picture of what might have lain under those events, certainly in relation to the clandestine meeting in Mr Mathebula's vehicle, uncovering what was going on would require more time than is available to this inquiry. Nonetheless, the evidence I have related, is in itself, troubling indeed.

[23] One asks why neither Mr Moyane nor Mr Mathebula took steps to ensure the intercepted conversation that allegedly implicated Mr Mundie in unlawful activity was obtained and investigated. We do not think it is an answer from a senior member of management that it was not his affair because Mr Mundie did not report to him, which was Mr Mathebula's explanation. Knowing that Mr Mundie was alleged to have been involved in criminal activity, but not knowing whether that had been investigated, Mr Mathebula was unperturbed by requests by Mr Mundie to investigate others, that he rejected Ms Van Wyk's analysis without any reference to her, and that he was unperturbed by Mr Mundie and his team operating without due governance.

[24] Mr Mathebula claims that ‘throughout this process, I remained concerned about the lack of a holistic anti-corruption strategy and the fragmentation of the Units that are the key implementers of that strategy.’ To substantiate this claim, he submitted the minutes of the Audit and Risk Committee meeting during which the matter was discussed at his instance. However, that meeting occurred on 31 July 2018 and is no support for his alleged concern at the time.

[25] Then there is Mr Mathebula’s account of the clandestine meeting that is so extraordinary as to be bizarre. The idea of the Commissioner of SARS and a senior member of management meeting clandestinely in a car, where Mr Mathebula was told to sign a SARS memorandum that had, for unexplained reasons, been going ‘back and forth’, against his will and amidst ominous threats being conveyed by the Commissioner, is astonishing. Even more astonishing is that in relating those events Mr Mathebula seemed quite unperturbed.

[26] Mr Mathebula submitted a written statement to the Commission, to which he spoke in oral evidence. Much of what he said was appropriately high-minded, expressing, as he did, a commitment to integrity and protection of the reputation of SARS. He described his role in his permanent position as being ‘responsible for inter alia governance and the reputation of SARS, this being a significant fiduciary responsibility calling for care and diligence underpinned by hard work and SARS’ values.’ All of that is undoubtedly correct, but his conduct in relation to the events I have described does not seem to us to be consistent with those sentiments. I would expect senior management of SARS to be attuned to the considerable opportunity for corruption within SARS, and to take immediate steps to cause investigations to be made of any suspicion of corruption, which did not occur in this case.

[27] In our view, Mr Mathebula was duty-bound as a senior member of management to ensure the recording was obtained from the SSA and to take steps to ensure the allegations concerning Mr Mundie were investigated. He was also under a duty to report to the Minister of Finance and to his senior colleagues that he had been asked by

the former Commissioner of SARS to sign a document against his will in clandestine circumstances, and was under a duty to ensure an investigation of why he had acted clandestinely. We do not think the public can be expected to have faith in SARS if its senior management does dubious business in the parking garage.

[28] We think it is clear from that evidence that investigation of the illicit tobacco trade was probably compromised in the period under inquiry, which is corroborated by the evidence of Mr Morden that I come to in the next chapter, but we are not able to make positive findings going beyond that in this inquiry. It is equally clear that capacity to investigate that and other illicit trades, under proper governance, needs to be re-established, which we recommend.

CHAPTER 9: REVENUE COLLECTION

[1] In litigation commenced by Mr Moyane against the President, the Commission and others, Mr Moyane claimed in his founding affidavit to have been the best Commissioner that SARS has had. The 64 witnesses we have heard, and others as well, seem not to agree, and I can find no basis in Mr Moyane's affidavit for making that claim other than that revenue collection during his tenure exceeded R1 trillion for the first time. That is indeed correct, but the claim reflects that Mr Moyane has little understanding of economics.

[2] In revenue collection no figure is significant by itself, psychologically or otherwise. Inflation alone is bound to increase revenue beyond any arbitrary figure over time. It just so happened that Mr Moyane was in office when that figure was R1 trillion. As it was expressed in evidence by Mr Cecil Morden, who was Chief Officer: Economic Tax Analysis at the National Treasury before he retired in 2016:

'I mean it's inevitable that we would've reached the trillion mark. I mean the trillion mark level is just smoke and mirrors really because the fact is that you have two factors that plays a role in nominal tax. One is the economy growing, expanding over time. In other words it's inflation. So if you have to buy a house in the year 2000 it would've cost you the average house 500 000. Today that same house will cost you a million Rand. So inflation plays an important role in the nominal numbers. So I don't attach much value to the trillion Rand level.'

[3] Mr Morden undertook an analysis of the revenue collected by SARS during the period under inquiry, at the request of the Commission, for which we are very grateful. He pointed to two important considerations to be borne in mind when evaluating revenue collection.

[4] What is significant in evaluating the efficiency of revenue is the relationship between the amount collected and the amount required to meet government expenditure, which must be estimated for purposes of budgeting. The second is that it

is misleading to refer to those as targets, which suggests they are aspirations, when that is not the case. The estimates are forecasts, aimed at predicting as accurately as possible, what is capable of being collected, so as to inform the budgeting for expenditure.

[5] Revenue estimates, or forecasts, are determined by a Revenue Analysis Working Committee, comprising representatives of National Treasury, the Reserve Bank and SARS. Its objective is to determine a best estimate of what can be expected to be collected, in advance of determination of the Medium Term Budget Policy and the Annual Budget. The Committee meets usually twice a year but sometimes more. The estimate that is made in anticipation of a particular budget year might need revision as the year progresses, producing more data on what can be expected.

[6] It is also misleading and self-defeating to evaluate the efficiency of revenue collection against a downwardly revised estimate. While the initial estimate might have been overly optimistic, falling revenue collection in the months that have passed by the time of the revision, will force the estimate down.

[7] The last estimate before the 2017/18 year was made on 22 February 2017. A revised estimate was published on 25 October 2017, and a further revised estimate was published on 21 February 2018. In October 2017 the initial estimate was revised in expectation of a shortfall of R50.8 billion, and was revised again in February 2018 to estimate that the shortfall for the year would be R48.2 billion. As it turned out, revenue collected for the year fell short of the initial estimate by approximately R49 billion.

[8] The shortfall for the 2016/17 year was the fourth in a series of increasing shortfalls. The shortfall for 2014/15 was R7.335 billion; for 2015/16 R11.292 billion; and for 2016/2017 R30.709 billion.

[9] This is what Mr Morden said in his evidence:

'Okay now this is the 17/18 revenue performance. And I must suggest here that we are looking at the actual outcome versus the budget announcement in 2017, okay. So this is for the year 17/18. It goes from April to March. That figure is the figure that was announced in budget 2017, at the beginning of the financial year. That was the actual outcome which means we collected 21 billion less than we anticipated. So PIT under-performed quite significantly. CIT also under-performed but less so. VAT also under-performed quite significantly 14 billion below, dividend withholding tax also under-performed. Another one that also under-performed which I didn't highlight but which warrants a little bit of deeper analysis is specific excise duties. This is mostly taxes on alcohol and tobacco, under-performed by 2.5 billion, similarly custom duties under-performed by 3.4 billion. So in total, this is where the figure that people talk about a lot. The under-collection was in the region of R49 billion for the 17/18 year....

Over the five years then if I add it up, from those four years, I think it's 2014, ja, it's five years the under-collection in PIT over a period was 22 billion, CIT 11 billion, VAT 40 billion, dividend withholding tax 2 billion, specific excise duties 5 billion, fuel levy 2 billion, then custom duties 14 billion. Relative terms if I take a simple, take this number as a percentage of what we actually collected last year, so just normalise figures, you can take any base here, you can see the worst performing one was custom duties, specific excise duties, VAT and then PIT'.

[10] Albeit that revenue from excise and customs duties on tobacco products forms a small part of the total, the decline is significant, because it correlates with the disbanding of capacity for investigating the illicit trades. These are the conclusions reached by Mr Morden from his analysis:

'So the problem with tobacco started in 16/17 where you expected it's more increases and then specifically in 17 18 there was a real problem. Now this goes beyond drop in cigarettes because it's just much lower than anything previously. So there is definitely a problem that occurred here. That's why you need to look at the imports and the domestic one together but even if you do that you'll find the problem started in 16/17 big time. It might have started there, I haven't got the previous figures to show you the actual increase but there's definitely a problem there and obviously 17/18 is a big problem.'

And later:

'Then obviously the significance, sorry, the significant slow-down in nominal excise duties in

[inaudible] are a clear indication of problems with enforcement and or increased illicit trades’.

[11] I do not think it is necessary in this report to analyse the various components of the shortfalls. After giving evidence Mr Morden submitted a written precis of the views he had expressed, which explains his analysis and is **Appendix 12**. For present purposes it is sufficient to say that while it is not possible to make definite causal connections for the shortfalls, Mr Morden’s view was that only part was attributable to the shrinking economy, the remainder being attributable to inefficiencies at SARS. The evidence we have had of falling taxpayer compliance corroborates that view.

[12] It was supported, too, by an analyst from the National Treasury, and by Dr Randall Carolissen, Group Executive responsible for research, who also prepared a careful analysis, for which the Commission is grateful. He said that tax buoyancy (the relationship between revenue collected and GDP) retreated from an average of 1.2 prior to 2016 to 1, taxpayer compliance continued to slip, the debt book grew from 2015 from about R85 billion to about R135 billion, the credit book moved from R40 billion in 2013 to R70 billion.

[13] It is perfectly clear from the evidence that SARS has experienced severe damage under the stewardship of Mr Moyane. Dr Carolissen’s written submission, to which he spoke in evidence, and which is very helpful, is included in **Appendix 4**.

CHAPTER 10: VAT REFUNDS

[1] It is inherent in the nature of Value Added Tax that refunds become payable to vendors in certain circumstances with the result that SARS is continually indebted to vendors as a group. Bearing in mind that SARS accounts for revenue on a cash basis, withholding the refund of VAT is capable of inflating its apparent revenue collection. There is a temptation, then, artificially to delay the refund of VAT towards the end of the fiscal year, which will present a more favourable picture of revenue collection than is in truth the case.

[2] There are many other reasons, however, why refunds of VAT might be delayed. It will be delayed, for example, if the risk engine utilised by SARS detects the possibility that the claimed refund is not due, in which case a 'stopper' will be placed on the claim, until such time as the claim has been verified by audit. Even then, the stopper might not be lifted timeously once the audit is complete.

[3] Delaying the refund of VAT that is due for repayment might make SARS' revenue figures look bright, but it has a deleterious effect on the economy. The cash flow of small enterprises, for example, might be seriously impeded, with the result even that the enterprise goes out of business. Moreover, the release of refunds provides stimulus to the economy, that does not occur if the money remains in SARS' bank.

[4] During the period under inquiry there have been many complaints of undue withholding of refunds of VAT, so much so that the Office of the Tax Ombud conducted its own investigation. In his Annual Report for 2016, the Tax Ombud summarised the issue, the action taken by his office, and the response of SARS as follows:

Issue:

SARS places stoppers on refunds for various reasons and fails to remove them once the verification has been done or the requirements have been met. This causes delays in paying out outstanding refunds without any communication or notice to the taxpayer.

Action taken by the Office of the Tax Ombud:

Recommendation made for SARS to ensure that, after audits have been finalised, all risks identified must be cleared and the refund stoppers simultaneously lifted; the refund SLA is to be adhered to at all times. SAR is to communicate to affected taxpayers the reasons for withholding refunds.

Action Taken by SARS:

SARS has implemented stringent refund rules to mitigate its risk due to fraud previously experienced. SARS refund rules are consistently revised to catered for taxpayer behaviour and trends. There are ongoing enhancements to SARS's refund systems which allow for the immediate processing of a refund and will improve turnaround times. This will include ensuring payments are not stopped repeatedly with no result. SARS further indicated that almost 90 % of all refunds are paid within 60 days of submission.

[5] There are signs in the trends presented to us by Adv Eric Mkhawane, Chief Executive Officer in the Ombud's Office, and in figures presented to us by Mr Morden, that there might have been deliberate withholding of refunds in anticipation of the end of the fiscal year. However, our inquiries have not revealed any definite instruction for refunds to be withheld to boost apparent revenue figures. In response to questions posed to him in the course of his evidence, the acting Commissioner said he harboured some suspicion that it might be occurring, but had no firm basis for any such conclusion.

[6] This is a matter calling for operational investigation and correction of systemic obstacles that are preventing repayment of VAT that is due. The withholding of VAT refunds has serious consequences for the economy and in particular for the survival of small business. The acting Commissioner is aware of the problem, and we are told is acting to correct it, but we nonetheless recommend that SARS urgently undertakes an

operational investigation for the purpose of correcting systemic obstacles preventing the prompt refunding of VAT that is due.

Refunds to Companies in the Oakbay Group

[7] Under section 44(3)(d) of the Value Added Tax Act 1991, since its amendment in 2011, VAT refunds may only be paid to the vendor, or, on certain conditions, to holding or subsidiary companies of the vendor.

[8] Sometime in 2016 the major banks refused to maintain accounts for companies associated with members of the Gupta family, that included Optimum Coal Mine (Pty) Ltd, Tageta Exploration & Resources (Pty) Ltd, Sahara Computers (Pty) Ltd, and Annex Distribution (Pty) Ltd, with the result that there were no accounts into which their refunds could be paid (it is said they still had access to accounts with the Bank of Beroda but that is not material for present purposes).

[9] During the period 13 December 2016 to June 2017 a number of VAT refunds were paid by SARS to the trust account of attorneys De Jager van Wyk Inc. It will be apparent that an attorney's trust account is not one of those permitted by section 44(3)(d).

[10] An affidavit was submitted to the Commission, at its request, by Ms Estelle de Jager of the firm De Jager Van Wyk Inc., explaining how that came about. She said Terbium Financial Services (Pty) Ltd had been a client. Mr van der Zee of Terbium had asked her to allow her trust account to be used for the receipt of the VAT refunds, in view of the fact that the companies, clients of Terbium, had no bank accounts. She met with Mr van der Zee, Ms Ronica Rogovan and one other from the Oakbay group, and two SARS officials at the head office of SARS, who confirmed it was permitted, and she then allowed it.

[11] A schedule of the payments received by SARS was attached to her affidavit. It reflects that the vendors in each case were one or other of the companies I have referred to, and that the payments left the account within a few days, going to Terbium.

[12] I have examined the relevant SARS records and find no indication of any undue interference leading to the payments. The trust account ought not to have been registered for the various vendors, as that is contrary to section 44(3)(d) of the Act, but I find nothing to indicate anything other than systemic failures that caused that to incur. An investigation by Internal Audit ordered by the acting Commissioner of SARS indicated some irregularities in the payment of refunds (not confined to these) but gives no indication of intentional preference being given to the companies concerned.

[13] In evidence before the Commission the acting Commissioner said that it was not unknown that attorneys' trust accounts have been registered for VAT refunds, albeit that that is not permitted.

VAT Refund Authorised by Ms Refiloe Mokoena

[14] Oakbay Investments (Pty) Ltd is one of the companies whose bank accounts were closed. A VAT refund fell due to Oakbay, and the company wanted it paid to a company that was neither a subsidiary nor a holding company. There had been some vacillation as to whether that could be permitted. Ultimately Mr Moyane instructed Ms Refiloe Mokoena: Chief Officer: Legal Counsel, to resolve it. She decided the payment was permissible, and it was paid.

[15] Early in the life of the Commission, Ms Mokoena approached the Commission and asked to appear before it, in order to answer the allegations, which the Commission was happy to permit. Soon thereafter she was suspended pending an inquiry relating to the matter.

[16] In deference to the pending disciplinary proceedings, the Commission has not inquired into the matter and makes no findings in that regard.

CHAPTER 11: LITIGATION

The Auditor-General

[1] I have referred elsewhere in this report to the dispute that arose between the Commissioner on the one hand, and the Minister of Finance and the Auditor-General on the other hand, concerning the authority to pay bonuses to senior management.

[2] That led to an application being brought in the High Court on 19 October 2017 by SARS, founded upon an allegation by Mr Moyane that

‘[in] auditing SARS financial statements and its annual report for the financial year ending in March 2017, the AG has made a finding that the payment of bonuses to SARS employees which I have effected without ministerial approval was in contravention of the SARS Act and thus constitutes irregular expenditure within the contemplation of the Public Finance Management Act No. 1 of 1999.’

Declaratory orders were sought in, amongst others, the following terms:

‘The Auditor General’s findings in the audit report in respect of the SARS annual report and financial statements that performance bonuses were paid in contravention of section 18(3) of the SARS Act due to absence of ministerial approval is invalid, unlawful and set aside.

....

The Auditor General is directed to issue a clean audit to the SARS in respect of the financial year 2016/2016’ (sic)

[3] As far as I am aware, litigation by a state entity against the Auditor-General contesting his or her audit findings is unprecedented, and for good reason. The independence of the Auditor-General is constitutionally protected, a protection repeated in s 3 of the Public Audit Act, under which the Auditor-General is the supreme audit institution of the Republic, is independent and is subject only to the Constitution and the law, and must be impartial and must exercise the powers and perform the

functions of office without fear, favour or prejudice, and is accountable only to the National Assembly.

[4] It is in the nature of his or her function that the Auditor-General must form his or her independent opinions, rationally and in good faith, concerning the financial management of the institution concerned, and cannot be compelled to adopt in their place the opinions of even the courts. To conclude otherwise would entirely undermine the function of the Auditor-General. Should the institution concerned contest those opinions its remedy is to note its contestation to the National Assembly when presenting its financial statements.

[5] The application brought against the Auditor-General was misconceived, and was bound to fail, but no doubt if it was brought on the advice of SARS' legal advisers it might have been misguided but cannot be said to have been brought irrationally. Nonetheless, the litigation was not brought in the interests of SARS, but in the interests of its senior managerial employees. Only a moment of reflection ought to have been sufficient to appreciate that defying both the Minister of Finance and the Auditor-General in pursuit of senior management's own bonuses, would bring SARS into disrepute.

[6] The application has since been properly withdrawn by the acting Commissioner after the suspension of Mr Moyane.

Other Litigation

[7] On 19 February 2016 the Mail & Guardian published an article written in collaboration between two journalists, Mr Craig McKune and Mr Sam Sole, under the heading 'SARS Wars: Moyane's empire strikes back '. In essence, it was alleged that Mr Moyane, assisted by Mr Makwakwa, set about destabilising SARS, in particular the Large

Business Centre, with the result that senior employees were marginalised and many departed, leaving control of taxpayer affairs in the hands of Mr Makwakwa. Those facts were substantially correct. The inference was drawn that this was done for nefarious purposes, which was plausible, though not necessarily the correct one, in the absence of contrary explanation.

[8] The response was a summons issued against the Mail & Guardian and the two journalists, in the name of Mr Moyane, Mr Makwakwa and SARS as plaintiffs. The first claim was for damages for defaming the three plaintiffs. The second claim was for a declaratory order that the defendants had breached section 67 of the Tax Administration Act, in that they had disclosed taxpayer information.

[9] On 24 March 2015 Mr Adrian Lackay, formerly the official spokesperson for SARS, who had by then resigned, addressed a letter to the Chairperson of the parliamentary Standing Committee on Finance, in anticipation of Mr Moyane addressing the committees in the next few days, 'on the events that have recently occurred in [SARS] and related institutions'. It is a lengthy letter that I see no need to recite. Suffice to say it contained Mr Lackay's account of the events ignited by the newspaper reports of the existence of a 'rogue unit'.

[10] The response of Mr Moyane was to issue summons against Mr Lackay, in his name and that of SARS as plaintiffs, on 20 May 2015. The first claim was for an order declaring that Mr Lackay had unlawfully breached the oath of secrecy by which he was bound, and had unlawfully disclosed taxpayer information. The second claim was for damages for defamation.

[11] In about November 2017 a book authored by Mr Jacques Pauw was published under the title 'The President's Keepers'. The book contained numerous allegations relating to alleged irregularities at SARS, particularly in relation to its relationship with certain named taxpayers.

[12] On 8 December 2017 an application was launched against Mr Pauw in the High Court, in the name of SARS as applicant, supported by a founding affidavit deposed to by Mr Moyane, in which an order was sought declaring that he had unlawfully disclosed confidential information or taxpayer information in contravention of chapter 6 of the Tax Administration Act.

[13] There are three features of the litigation that I deal with separately.

[14] The first is that it is settled law that an action for defamation is not available to a state institution (*Die Spoorbond v S.A.R. & H.* 1946 AD 999). Secondly, it was not the esteem of SARS that was diminished by the publications of the Mail & Guardian and Mr Lackay, but that of the Mr Moyane and Mr Makwakwa. They sought merely to ride on the back of SARS in pursuance of their own interests and not that of SARS.

[15] It is improper for a state employee to litigate, purporting to act in the interest of the state, but in truth to advance the employee's interests, which applied in all these cases. Amongst senior management, it also breaches his or her fiduciary duty owed to the organisation, in that his or her obligation is to pursue the interests of the organisation, and not those of their own. The litigation was not in the best interest of SARS. Indeed, one asks what was sought to be achieved by declaratory orders relating to past events.

[16] On the contrary, it was detrimental to SARS for litigation to be brought for the purposes of stultifying criticism of the management of SARS. The better response, if the interests of SARS are to be protected, is to investigate the alleged improper conduct, and where necessary correct it, instead of attempting to intimidate the bearer of the news.

[17] But there is a third issue that arises in relation to all the litigation that was brought. Under Chapter 6 of the Tax Administration Act 28 of 2011 a SARS official may

not disclose taxpayer information or SARS confidential information other than in certain specified circumstances, and a person to whom such information is disclosed contrary to the Act may not, in turn, disclose or publish the information. SARS officials are also bound by an oath of secrecy concerning SARS affairs they take upon employment. Each of the cases purported to be brought to protect confidential taxpayer information, and in one case confidential information of SARS, and the oath of secrecy, and declaratory orders were sought to that effect.

[18] The prohibition against the publication of taxpayer information is intended for the protection of taxpayers and the facilitation of revenue collection by SARS. Similarly, the prohibition against the disclosure of SARS confidential information, and of the oath of secrecy, is aimed at facilitating revenue collection.

[19] The best interests of SARS would have been served by investigating the reported conduct, if it was unlawful, or explaining to the public that it was not unlawful, if it was not. If SARS was truly concerned that offences had been committed, they would have been reported to the press. Yet the only action taken so far as the disclosure of taxpayer and confidential information was to seek declaratory orders that served no practical purpose. What the litigation did do, was to expose the persons concerned to costly litigation, which they no doubt could not afford, and to warn others they could suffer the same fate. I think the inference is clear that the purpose of the litigation was not to protect the interests of SARS, but to stifle investigation of what was happening at SARS.

[20] In written submissions on behalf of the Mail & Guardian the Commission was invited to declare that taxpayer information may lawfully be disclosed where it serves the public interest, but I do not think the Commission should accept the invitation. It is not the function of the Commission to declare the state of the law. That is a matter for the courts in appropriate cases.

[21] The fact that Mr Moyane considered SARS to be his personal fiefdom, whose money he could spend in his own interests, is evident as well from three invoices rendered to and paid by SARS to a firm of attorneys. The invoices are **Appendix 12**.

[22] In two cases, according to the invoices, the instruction to the attorneys, and to counsel in one case, was to read two books – one entitled ‘The Maputo Connection’, the other entitled ‘Rogue’ – to determine in the first case whether it made reference to Mr Moyane, and in the second whether taxpayer information had been disclosed. The cost to the taxpayer in the former case was R120 000 and in the latter case R770 000.

[23] In the third case, Mr Moyane was alerted to suspicious financial transactions of Mr Makwakwa by the Financial Intelligence Centre, which I have not dealt with in this report, because it was a subject of disciplinary proceedings that only recently terminated, and Mr Makwakwa has not had an opportunity to respond. Nonetheless, the response to the alert was for Mr Makwakwa to be sent off to attorneys and counsel, at the cost of SARS, to advise whether the Financial Services Centre had acted lawfully in obtaining the information.

[24] The costs were paid from the employer relations cost centre under the control of Mr Lebelo. Mr Lebelo said he had no knowledge or involvement in the instructions that were given, which, he said at first, came from Mr Moyane. In a late written submission he said Mr Mathebula was instrumental in the instructions for the ‘Maputo Connection’ to be read, but we do not find it necessary to resolve that conflict.

[25] Mr Lebelo said as well that his department does not consider whether the work of attorneys is justified, but establishes only whether it has been done, before paying invoices. He said as well that if the Commissioner asked for invoices to be paid from his cost centre it was not for him to query the Commissioner. That reflects only how far any sense of governance had broken down.

[26] Clearly the litigation and other costs were incurred in the personal interests of Mr Moyane, in the last case to assist Mr Makwakwa in what was a personal affair, and not those of SARS, and we recommend that SARS take steps to recover the expenditure from Mr Moyane.

CHAPTER 12: SETTLEMENTS

[1] Section 146(1) of the Tax Administration Act empowers the Commissioner to 'settle' a 'dispute' in whole or in part, provided that, amongst others, the settlement is *"to the best advantage of the state"*, it is *fair and equitable to both the person concerned and to SARS*, and the Commissioner has regard to various factors. Similarly, the Customs and Excise Act permits the settlement of disputes.

[2] Section 149 of the TAA requires SARS to maintain a register of all disputes that are settled and to 'document the process under which each dispute is settled.' The Commissioner is required to provide an annual summary of settlements to the Auditor General, including the number of settlements, the amount of tax forgone, and the estimated savings in litigation costs. Section 77P of the Custom and Excise Act has a similar provision.

[3] In practice the prospect of settlement arises after a taxpayer's objection to an assessment has been disallowed and the parties remain in dispute over a legal or factual issue. At that point, the matter can either be referred to Alternative Dispute Resolution ("ADR"), or one of the parties can make a settlement offer.

[4] Settlements are considered by National Appeals Committees of SARS, under authority delegated by the Commissioner to the chairpersons of the committees, to be exercised within the confines of terms of reference, at one of four tiers depending on the amount of the tax liability:

Tier 1: Above R1 million

Tier 2: R10 million to R30 million

Tier 3: R30 million to R100 million.

Tier 4: R100 million and above.

[5] The procedure for settlements at the 4th Tier is that once an objection is disallowed and the tax payer appeals, the matter is allocated to the original auditor on the matter and allocated to an official within legal. If a settlement offer is made by the taxpayer, or the legal and audit personnel consider the matter ready to be settled, they will request that the matter be placed before the NAC. Legal and Audit will prepare a submission to the NAC meeting with the background of the case and a recommendation for settlement. They will attend the meeting, where they will present the case, and make their recommendations, and the chairperson of the NAC will, in the exercise of his or her delegated authority, either accept or reject the recommendation.

[6] The chairperson may not exercise that authority other than within certain confines, of which the following, which are not exhaustive, are stated in the terms of reference:

- a) Since the Chairperson is the official to whom the Commissioner has delegated or designated authority, the determination of a matter before a Committee is the decision of that Chairperson, and not that of the Committee.
- b) However, the Chairperson may not make a decision unilaterally, outside of the Committee process prescribed in this TOR or in a manner that disregards the purpose of the Committees.
- c) The Chairperson should attempt to attain consensus amongst the Committee Members or, if consensus cannot be reached, then ascertain what the majority view is. The Chairperson must make a decision after proper deliberation with the Committee Members, and after taking into account the views, opinions, concerns and recommendations of all the Committee Members.
- d) If the majority of members disagree with a proposed decision then the Chairperson must refer the matter to the next level Committee.

[7] The internal SARS documents governing the settlement process include the Appeal and Settlement Committees' Terms of Reference signed on 15 April 2016. The Terms of Reference were first produced in January 2005 and have been amended over time. The former Commissioner approved amendments to the TOR in June 2015 and

April 2016. On 29 May 2017, the TOR were amended to include the appointment of the Chief Officer: Legal Counsel, who was then and still is Ms Refiloe Mokoena, as the chairperson of the NAC 4th Tier.

[8] Needless to say, the potential for impropriety exists in relation to all settlements, not only those of high value, and it was not practical for the Commission to examine them all. The Commission selected seven high value cases in which offers of settlement were made, some of which were accepted, for evaluation.

[9] There are two in particular that bear mention, not because impropriety or preference was established. In both cases there were long-standing disputes. In one case Mr Moyane and Mr Makwakwa met with the taxpayer and agreed an amount to be paid in settlement. When presented to the NAC, however, the settlement was rejected. In another case there was some pressure on the NAC to settle the matter urgently but the NAC rejected offers. Ultimately it was settled on a split vote of the NAC, with the chairperson making the final decision. While there is lingering suspicion concerning that settlement we have found no evidence that the taxpayer was improperly favoured.

[10] All the selected cases were dealt with through the ordinary process, and the Commission is not able to say there was improper favouring of any of the taxpayers concerned. Governance in matters of settlements, achieved by delegation of the Commissioner's authority to the chairpersons of the NAC's, with clear terms of reference, appears to be relatively robust.

[11] But what might often be more revealing than settlements that are reached is what happens to cases after settlement proposals are rejected. There are cases in that category in which settlement offers were rejected but claims by SARS have not been

resolved, and these might be irregular in the collection process that warrant investigation going beyond the scope of this inquiry.

[12] It is a matter of concern for governance of settlements that shortly before his suspension, the former Commissioner sought to retrieve for himself those delegated powers, to be exercised by himself solely, in disputes concerning tax claims over R100 million. Even more concerning is that EXCO seemed unperturbed. At an EXCO meeting held on 26 February 2018 it was 'noted' that:

'In light of improvement of Governance processes, the TOR were revisited and amended as follows:

- i. The previous four (4) committees (Tiers) had been reduced to three (3) committees;
- ii. The oversight role of the Commissioner has been included. The Commissioner would consider and determine:
 - a) Settlement of any dispute that is referred by Tier 3; and
 - b) Any appeal where the amount of Tax, Customs or Excise in dispute exceeded R100 million and that was referred by any committee regardless of the amount involved (see Page 6, clause 3(b) of the TOR).'

[13] A draft of the amended terms of reference was prepared and submitted to the former Commissioner in about March 2018. As foreshadowed in the EXCO minutes, it removed from the Chairperson of the 4th level NAC his or her delegated authority to settle disputed claims, over R100 million, and placed authority to settle such claims solely in the hands of the Commissioner.

[14] We do not see how it could possibly have been thought by EXCO that the proposal was an 'improvement of Governance processes', or that the amendment provided a mere 'oversight role of the Commissioner'. It was quite the opposite. Needless to say, the acting Commissioner has rightly withdrawn the proposal. We

recommend that the terms of reference of bodies authorised to settle claims be reviewed to ensure, and if necessary strengthen, governance mechanisms.

CHAPTER 13: BONUSES

[1] It has become customary for annual bonuses to be paid to SARS officials if SARS achieves its Annual Performance Plan targets. The pool from which bonuses are to be paid having been established, a distribution is made of part to be awarded to senior management, and part for the remaining employees. Senior management comprises those on grade 8 and above (senior managers, executives, group executives, chief officers, and the Commissioner). Bonuses are then awarded to individuals based on their personal performance, measured according to the Employee Performance Management System and the Incentive Scheme Policy.

[2] It had always been the practice of the Commissioner of SARS (and the acting Commissioner while the post was vacant) to seek the approval of the Minister of Finance for the payment of bonuses. On 12 June 2015, upon the recommendation of Mr Moyane, the then Minister of Finance, Mr Nene, approved

‘the SARS Bonus Framework as proposed under section 8 above. ***The actual performance results in each financial year will be used to calculate the actual bonus pool to be paid.***’

[3] On 26 June 2015 Mr Moyane applied to Minister Nene for the approval of salary increases for 2015 and bonuses for 2014/2015 for SARS EXCO members, which was approved by the Minister on 2 July 2015. Simultaneously the Chief Officer: Human Resources, applied to the Minister for approval of a salary increase for Mr Moyane, and a bonus, for the same period, which was also approved. The fiction resorted to, of the Commissioner and EXCO each awarding bonuses to the other, immediately exposes the conflict of interest inherent in senior management awarding their own bonuses.

[4] By 7 April 2016 Mr Gordhan was the Minister of Finance. On that day he wrote to Mr Moyane requesting ‘information regarding the arrangements in place in your

entity (SARS) regarding salary increases and bonus payments for FY2016/17 and FY2017/18’.

[5] Mr Moyane’s reply, on 11 April 2016, so far as bonuses were concerned, was the following:

‘5 PAYMENT OF BONUSES

- a. In 2015 SARS developed a three-year framework for the performance cycles 2014/15 to 2016/17; for the payment of bonuses in consultation and approval of the erstwhile Minister of Finance, Mr Nhlanhla Nene.
- b. The framework provides for the payment of bonuses based on the revenue collection achieved and the annual performance plan score achieved. ‘

[6] It is apparent that the Minister asked for further information, because on 14 April 2016 Mr Moyane wrote to him saying he did not consider himself obliged to provide certain of the information, and declaring various intergovernmental disputes that he required to be resolved under the Intergovernmental Relations Framework Act 13 of 2005. Amongst them was

- ‘5.1 Whether the Minister has powers to supervise the office of the Commissioner for SARS, for purposes of employment relations.
- 5.2 The powers of the Minister in respect of bonuses and salary increment pertaining to the Commissioner of SARS.
- 5.3 The powers of the President in respect of bonuses and salary increment of the Commissioner of SARS’.

[7] That notwithstanding, on 21 June 2016 a recommendation was submitted to the Minister for approval, under the hand of Mr Teboho Mokoena, Chief Officer: Human Capital and Development, and Mr Moyane:

‘It is further recommended that the Minister approves the incentive bonus pool for SARS employees of R561 419 788 (10% of GTP). The framework approved in 2015 provides for a

bonus pool on 10% of achievement of the target (The revised target of R1 069 billion was marginally exceeded).

[8] The Minister declined his approval. He wrote in handwriting on the document:

- '1. This memo was received in my office on 29 June 2016.
- 2 The memo signed by Min Nene on 12 June 2015 is revoked as far as its applicability to 2016/17.
3. The above memo is erroneous in several respects - which I will discuss with management.
4. The country is in a serious fiscal and economic crisis. This must guide my decisions.
5. My decision takes full account of the great commitment of the staff on the ground.
6. Government has been and will continue to promote prudence and modesty in salary increases.
7. Accordingly, the salary increases of non-bargaining unit staff will be in line with the SMS in the public service (see circular).
8. This is an interim measure given present circumstances.
9. Performance Bonus 2015/16
 - 9.1 Given the fiscal circumstances, I am compelled to take this into account for the bonus as well.
 - 9.2 The final decision on the bonus will be taken once the Performance Assessment takes place after you supply the information.
 - 9.3 You will be informed of a date for 9.2.'

[9] Dissatisfied with this response, Mr Mokoena, wrote to Mr Moyane on 28 July 2016, advising that

'SARS has in the past committed a mistake of law wherein the institution has requested an approval from the Minister of Finance prior to effecting payment of employees' incentive bonuses and/or salary increments. For reasons explained hereunder as provided through legal opinion, such previous requests were purely based on a mistake of law and thus erroneous, irregular, and potentially unlawful'.

[10] He also recommended, amongst other things, repeating the recommendation that had earlier been submitted to the Minister for approval, that

‘the Commissioner approve the incentive bonus pool for SARS employees of R561 419 799 (10% of GTP). The framework approved in 2015 provides for a bonus pool of 10% on achievement of the target (the revised target of R1 069 billion was marginally exceeded)’.

That recommendation was approved by Mr Moyane on 29 July 2016.

[11] What Mr Mokoena wrote to Mr Moyane was wrong on every score. It was not SARS as an institution that applied for approval in the past, but the Commissioner as head of the institution, and he made no ‘mistake of law’ in doing so. Clearly he and senior management that supported the request had an interest in bonuses being awarded, potentially to themselves. It was thus not erroneous to have sought approval, nor was it irregular, nor was it ‘potentially unlawful’. And even had the law not required it, it can hardly be said to be erroneous, nor irregular, nor unlawful, to seek approval nonetheless.

[12] On 12 August 2016 Mr Moyane wrote to Mr Gordhan saying he had sought legal advice, which was to the effect that he (Mr Moyane) had exclusive administrative authority and operational control over all SARS operational matters, including employees' bonuses and salary increments for any financial year. In conclusion, he said:

‘In light of my acceptance of the aforementioned legal advice, I hereby inform the Minister that I have already taken the decision to effect payment of bonuses and salary increments to SARS employees. Therefore, it is unnecessary for the Minister to make any further decisions pertaining to the same as the Minister is not authorised by law to do so.’

[13] The SARS payroll reflects bonuses paid to then EXCO members, other than the former Commissioner, on 15 August 2016 (for the 2015/16 year). There is no indication that the bonuses took account of the fiscal and economic crisis referred to by Mr Gordhan. The following year bonuses were again paid to EXCO members, other than

the former Commissioner, on 15 June 2017 (for the 2016/17 year). Ms Makola, Ms Mokoena and Ms Makhekhe-Mokhuane were not yet employees of SARS.

[14] That commenced a stand-off that ended in litigation. On 17 August 2016 the Minister of Finance wrote to Mr Moyane referring to a meeting on 15 August at which he had 'emphasised the need to take into account the serious fiscal and economic crisis facing South Africa'. He continued:

'4. As to performance bonuses, I referred to the need for performance assessments of SARS as a whole for 2015/16 prior to a decision on bonuses. This is normal in any well-run organization. This must determine the bonus pool and appropriate sharing of the pool between the majority of the staff at grades 1 to 6 and those on management levels, i.e. grades 7 to 10. In the light of the concerns relating to the payment of bonuses to staff I urge you to expedite the finalization of information that will enable the SARS performance assessment'.

He continued:

'6. It is unethical, immoral and illegal for top management to determine its own salary increases and bonus payments without any external / executive scrutiny.

7. I am advised that –

7.1 the power to approve the terms and conditions of employment of the non-bargaining unit staff vests in the Minister in terms of section 18(3) of the SARS Act;

7.2 your decision to effect payment of salary increments and bonuses for senior managers as managers, as indicated in your letters of 12 and 15 August 2016, without my approval is contrary to section 18(3) of the SARS Act;

7.3 such expenditure will constitute irregular expenditure in terms of the Public Finance Management Act, which you as an accounting authority are obliged to prevent;

7.4 an accounting authority that makes or permits financial misconduct commits and act of financial misconduct which is a ground for dismissal or suspension (section 83 of the PFMA);

[15] Mr Moyane replied in a testy letter on 18 August 2016, of which the following is the relevant portion:

'You have misconstrued the scope and meaning of section 18(3) of the SARS Act 34 of 1997 ("Act"), as amended. The provision of section 18(3) of the Act grants you the power to approve the terms and conditions of employment for any class of employees in the management structure of SARS. My decision to effect salary increment and payment of bonuses to SARS employees does not constitute an amendment and/or variation of the existing terms and conditions of employment for any class of employees in the management structure of SARS as contemplated in section 18(3) of the Act. For avoidance of doubt, salary increment and payment of bonuses does not constitute the terms and conditions of employment. Salary increment and payment of bonuses are subject to the discretion of my office. Therefore, your reliance on section 18(3) of the Act is misplaced.'

[16] On 9 September 2016, the Minister reported to the Auditor General that Mr Moyane had contravened section 18(3) of the SARS Act. The Auditor General shared that view and concluded that the resultant non-compliance with the SARS Act could result in irregular expenditure. The Auditor-General's view was communicated to SARS on 19 July 2017 for a response. The Auditor General duly reported his findings to Parliament.

[17] On 19 October 2017 SARS brought an application in the High Court, founded upon an allegation by Mr Moyane that

'[in] auditing SARS financial statements and its annual report for the financial year ending in March 2017, the AG has made a finding that the payment of bonuses to SARS employees which I have effected without ministerial approval was in contravention of the SARS Act and thus constitutes irregular expenditure within the contemplation of the Public Finance Management Act No. 1 of 1999.'

Declaratory orders were sought in, amongst others, the following terms:

'The Auditor General's findings in the audit report in respect of the SARS annual report and financial statements that performance bonuses were paid in contravention of section 18(3) of the SARS Act due to absence of ministerial approval is invalid, unlawful and set aside.

...The Auditor General is directed to issue a clean audit to the SARS in respect of the financial year 2016/2016' (sic)

[18] That application did not proceed and, wisely, has since been withdrawn by the acting Commissioner.

[19] Mr Moyane said legal opinions furnished by Adv Mokhari SC, Adv Maleka SC and Adv Trengove SC supported his position. That is not correct. I pointed out in Chapter 8 that Adv Maleka SC and Adv Trengove SC had furnished opinions to the effect that it was within the prerogative of the Commissioner to select the persons to be appointed to senior management positions, but that approval of their terms and conditions of employment required the approval of the Minister. Their opinions said nothing of bonuses in particular.

[20] The opinion furnished to the Commissioner by Adv Mokhari SC deals with the issue of bonuses only briefly, without analysis of the basis upon which he reached his conclusion. It also overlooks the fact that approval by senior management of their own bonuses and salary increases offends a basic principle of good governance.

[21] Opinions furnished to the Minister of Finance and to the Auditor-General by Adv Trengove SC and Adv Chohan SC respectively, both concluded that ministerial approval was indeed required for the payment of bonuses to senior management, on the grounds that the payment of bonuses fell within the scope of the terms and conditions of their employment, which, as Mr Moyane had been told, required ministerial approval.

[22] We share the views of Adv Trengove SC and Adv Chohan SC that ministerial approval is indeed required for bonuses to be paid to employees in the managerial structure of SARS (the category of employees now relevant), as reported by the Auditor-General. It is precisely because there is a potential conflict of interest that that is required. As it was expressed by Adv Chohan SC in the opinion furnished to the Auditor-General on 10 September 2017:

‘As mentioned above, the Commissioner has the sole discretion to determine the terms and conditions of non-managerial employees at SARS. The Minister does not have to approve the

terms and conditions of employment of non-managerial employees. But for employees that fall within the class of management, the Minister must approve the terms and conditions of their employment. The question that immediately strikes one is “why?” Why is such power conferred upon the Minister in respect of managerial employees?

The reason we submit is to provide the Minister with an oversight role in relation to those employees who exercise a degree of control within SARS in relation to their own terms and conditions of employment.

Having regard to the language of section 18(3) and the purpose of the provision, the Minister’s approval is intended to regulate the terms and conditions of those employees who otherwise would have an unrestricted discretion as to their own employment conditions.

In our view, the mischief that section 18(3) of the SARS Act seeks to address is the potential of senior managers determining their own remuneration and bonuses without any recourse to the fiscus or financial position of SARS which the Minister is naturally in the best position to assess. Without such oversight, there exists a danger that salaries or bonuses determined and approved by senior managers in conjunction with the Commissioner may detrimentally affect the financial stability of SARS and possibly the National Treasury. As head of the Treasury, the Minister must be in a position to oversee that the payment of performance bonuses or increase in salaries is on reasonable terms and is justified by the financial position of SARS.

The Commissioner cannot have the discretionary power to approve an increase in salaries and bonus adjustments for employees in the management structure, without the approval of the Minister. To interpret section 18(3) in a manner that provides this discretion to the Commissioner removes the Minister’s oversight functions’.

[23] In response to an invitation to make submissions on why certain findings should not be made by the Commission, Mr Mathebula said the bonuses for the 2016/17 year were lawful because they were approved by the then Minister of Finance, Mr Gigaba. That is not correct. On 16 May 2017 a memorandum was sent to the Minister requesting ‘ratification of the Commissioner’s authority’ to approve bonuses, which he approved. The Minister was not capable of conferring authority on the Commissioner of SARS, by ratification or otherwise, to award bonuses contrary to law.

[24] To avoid doubt as to the meaning of section 18(3) of the SARS Act, we recommend that section 18(3) be amended to clarify that the terms and conditions of employment of employees in the senior management structures of SARS include remuneration, bonuses, and all other benefits of their employment, and alterations to those terms of employment

[25] But leaving aside the legislation, there is a common law principle underlying the section, as Adv Chohan explained, which is that senior management owe a fiduciary duty to SARS not to act where they are conflicted. Both Mr Mathebula and Mr Mokoena contend that because EXCO did not award themselves bonuses, but they were awarded by the former Commissioner, they were not conflicted and did not breach their fiduciary duty. As they see it, only the Commissioner, who awarded the bonuses, would be conflicted, if he had awarded a bonus to himself. For the rest, senior management are free to acquiesce in the payment of bonuses to themselves.

[26] I regret we disagree. EXCO acts as an advisory body the Commissioner. They are conflicted in that advisory role, even if they do not have the final say. If bonuses to be awarded by the Commissioner to themselves are excessive, it is their duty to say so and not receive them. They will hardly be expected to do so if they are the beneficiaries. It is apparent from the submissions made by Mr Mokoena and Mr Mathebula either that they were oblivious to their duty, or failed to carry it out. Governance fails when senior management do not stop even to ask whether they are conflicted.

[27] There is another matter upon which the new Commissioner might review the system of bonuses, alluded to by the Auditor-General, and dealt with in chapter 15. In our view it is anomalous if the payment of bonuses is determined by whether SARS meets revised estimates. As I have pointed out elsewhere, estimates might be revised down precisely because SARS has not performed in the months leading to the revision. It can hardly be right that bonuses are paid because SARS met its under-performance.

CHAPTER 14: TAXPAYER AFFAIRS

[1] The terms of reference require the Commission to report, in various ways, on favourable or unfavourable treatment being accorded to a domestic prominent influential person (as defined in section 1 of the Financial Intelligence Centre Act), an immediate family member of such a person, or a known close associate of such a person. The Commission is also required to report on whether there has been non-standard treatment of any persons referred to in section 8(1)(e)(i) of the Income Tax Act, section 18(3) of the South African Revenue Service Act, any persons connected to such persons.

[2] Needless to say, a large number of people fall into those categories, and it is not feasible to examine the affairs of them all. I thus selected a sample of individual taxpayers and related companies, some falling within one or other of those categories, and others for comparison, on the assumption that if no favouring is detected in their affairs, it is then unlikely it will be detected in the affairs of others.

[3] Their tax records were inspected only by me, and in some cases with counsel for the Commission, in the company of the acting Commissioner and his colleague for purposes of explanation in some cases, and in other cases without the acting Commissioner but with the assistance of other authorised SARS employees.

[4] I did not detect favourable treatment to any of the selected taxpayers, but must also make it clear that I am not able to say whether or not all income was declared. In most cases the records indicate that the returns were subjected to audit, but what was meant by audit is no more than a desk-top document review. What is remarkable in the case of some taxpayers is that the income declared bears little or no resemblance to their reputed or ostensible wealth. The absence of any apparent relationship, however, is not a phenomenon that occurs only during the period with which this inquiry is concerned, but predates that period.

[5] One difficulty with auditing taxpayers is that the key performance indicators of auditors favour the number of audits that are completed and not the extent of the audit. In response to my request for the interrelationship of persons and entities related to one company, what was produced was a veritable web of interlinking individuals, companies and bank accounts that would no doubt take a skilled forensic investigator considerable time to unravel.

[6] Investigative audits are indeed carried out, but generally selected by the risk engine, and not human intervention. The acting Commissioner acknowledged that at least in some cases there was good cause for intensive audits that did not occur. In one case an investigative audit has been directed. Clearly SARS needs to review its audit policies, and the KPI's associated with audits, to allow for greater vigilance in relation to persons of ostensible wealth. We recommend that the case selection and audit protocols be reviewed to introduce protocols to ensure proper investigation of tax returns with reference to the ostensible assets of the taxpayer concerned, and that the key performance indicators be reviewed to facilitate such investigations.

CHAPTER 15: REPORT OF THE AUDITOR-GENERAL

[1] In his report for the 2016/2017 financial year, the Auditor-General found that SARS had overstated revenue performance in 2016/17. The Auditor-General noted that, in the draft SARS annual report, SARS said that 'despite challenging economic conditions SARS collected the revised estimated target, which represents a 6.9% growth in total tax revenue from 2015/16'. The Auditor-General also noted that SARS told the media on 3 April 2017 that it had achieved its revised estimate.

[2] The Auditor-General found the revised estimate had not in fact been met and that SARS undercollected an amount of R300 million. He identified the risks attendant on this misreporting as first, 'possible reputation risks based on misleading facts presented to the public', and secondly, the risk of 'incorrectly paying bonuses to staff based on targets reached while evidence proved otherwise'. The Auditor-General criticised management for not exercising adequate oversight responsibility and recommended management ensure that in future the information reported in the draft annual report and communicated to the public be consistent with the achieved estimate.

[3] The Auditor-General noted in his report that SARS management had defended itself by pointing out that, in the media statement of 3 April 2017, SARS had described the figures as 'preliminary'. The Auditor-General appeared not to give that defence much credence, and correctly so in my view. The media release created the perception that SARS had met the revised estimate and, when the final figures were available, it did not correct that perception. Nor did the fact that SARS had failed to meet the revised target stop the former Commissioner of SARS from awarding generous bonuses to EXCO.

[4] More disturbing, the Commission received evidence from two employees in Revenue Accounts that they told Mr Moyane before the release of the media statement of 3 April 2017 that the preliminary figures showed SARS had not met the revised

estimate. In determining how much revenue SARS had collected as at 31 March 2017, SARS was obliged to deduct the non-tax revenue it had collected on behalf of the RAF and UIF, as well bank reconciliation items on the opening bank balance. Those deductions amounted to R300 million. The witnesses explained that to Mr Moyane but nonetheless released a figure that included the R300 million. The witnesses both said that SARS employees who were aware of the overstatement of the figures were prohibited from sharing the actual collection figures.

[5] This is supported by an email chain between Mr Moyane and one of the witnesses in late December 2017. The witness had reported to Mr Moyane that, based on revenue collections at the end of the third quarter, SARS was facing a growing shortfall. Mr Moyane responded by saying that the figures were 'cause for concern', but that 'I would appreciate that you don't post the outcome of today's revenue figures.'

[6] The second adverse finding of the Auditor-General concerns the overstating of taxpayer compliance with regard to both corporate income tax and personal income tax. The Auditor-General found that SARS had not complied with the relevant laws and regulations in determining the percentage of taxpayers who had complied in the 2016/17 financial year.

[7] Dr Malovehle testified that he had warned EXCO that the definitions for compliance indicators SARS was using were not in line with legal requirements. His warning was ignored. His colleague, Ms Singh confirmed this evidence on affidavit.

[8] I referred in chapter 6 to further findings made by the Auditor-General relating to Information Technology Governance.

CHAPTER 16: DEBT COLLECTION CONTRACTS

[1] SARS has a sizeable book of debtors. At one time, before the period to which this Commission relates, it appointed debt collectors, who received a commission for their services, but with limited success. During 2015 it again set about appointing outside debt collectors.

[2] On 5 August 2015 Mr Makwakwa, then Acting Chief Officer: Operations, directed a memorandum to Mr Moyane, requesting approval for 'the utilisation and funding of an external debt collection agency to collect specified categories of debt on SARS' behalf'.

[3] He reported that at that time debt owing to SARS was approximately R96 billion, of which approximately R54 billion had been outstanding for less than four years (Category A), and approximately R14 billion had been outstanding for more than four years (Category B). The proposal was to outsource collection of Category B debt.

[4] Approval was granted and in October 2015 bids were invited on open tender for the appointment of service providers. Thirty three compliant bids were received and evaluated by the Bid Evaluation Committee, which recommended to the National Bid Adjudication Committee the appointment of 11 bidders to a panel of debt collection service providers for the collection of Category B debt.

[5] The National Bid Adjudication Committee adopted the recommendation and, in turn, recommended to the Commissioner the appointment of the eleven service providers to the panel. It recommended that the panel be appointed for a period of 36 months with an option to extend the contract for a period of twelve months. The recommendation was duly approved by the Commissioner on 17 December 2015.

[6] Amongst the eleven service providers appointed to the panel was Lekgotla Trifecta Consortium (LTC). The consortium comprised Trifecta Capital Collections (Pty) Ltd and Lekgotla Outsourcing (Pty) Ltd. One of the shareholders of Lekgotla Outsourcing was Mr Nhlamulo Ndhlela, who is a nephew of Mr Moyane. Another service provider appointed was New Integrated Credit Collections (Pty) Ltd.

[7] On 28 December 2015 the eleven members of the panel were invited to submit bids for the appointment of three members for a 'pilot phase' of debt collection. The bids were evaluated by the Bid Evaluation Committee, which recommended the appointment of NDS Credit Management (Pty) Ltd, CSS Credit Solution Services (Pty) Ltd, and LTC for the pilot phase. The Bid Adjudication Committee accepted the recommendation and, in turn, recommended the appointments to the Commissioner, who approved the appointments on 15 February 2016.

[8] Master Services Agreements were duly concluded between SARS and the three companies. The agreement with LTC was concluded on 1 March 2016. The agreements were for a period of 36 months, with an option on the part of SARS to extend the agreement for a further 12 months. Under the agreement SARS would, from time to time and when needed, issue a Service Request to the service provider to perform specific services.

[9] On 23 May 2016 a Service Request (No. 001 of RFP 29/2017) was issued to LTC, under which it was required to provide services for the collection of debt between R1 000 and R1 million that had been outstanding for four years or more. It was estimated that 85 000 debtors fell into that category with a total debt of R2.2 billion. The commission for collection would be 4.42% of debt collected, inclusive of VAT.

[10] The contract with LTC was terminated in about November 2017 in circumstances I come to presently.

[11] In about October 2017 SARS embarked on Phase 2 of its debt collection project, which was to 'appoint Service Providers from the panel (RFP 28/2015) for the collection of all outstanding debt and all outstanding returns linked to the Service Providers.'

[12] The Bid Evaluation Committee, and later the National Bid Adjudication Committee, recommended the appointment for Phase 2 of eight service providers, amongst whom was New Integrated Credit Solutions. Mr Moyane approved the recommendation on 15 February 2018.

[13] A Master Service Agreement was concluded with New Integrated Credit Solutions on 1 March 2018. The following day a Service Request was issued, allocating debt of approximately R2.1 billion to be collected, at a commission of 4.05%. On this occasion the debt to be collected included debt that was less than four years old. As at 10 May 2018 the sum of approximately R103 million had been collected.

The LTC Contract

[14] Mr Nhlamulo Ndhlela, who is a nephew of Mr Moyane, was a shareholder of Lekgotla Outsourcing (one of the members of LTC).

[15] Bidders were required to complete a form called 'Declaration of Interest' (Form SBD 4), in which they were required to respond to a number of questions. The question that is now relevant, to which LTC replied 'NO', was the following:

'Do you, or any person connected with the bidder, have any relationship (family, friend, other) with a person employed by the state and who may be involved with the evaluation and or adjudication of this bid'.

[16] In about August 2016 the Mail & Guardian newspaper directed queries to SARS relating to the relationship between Mr Ndhlela and Mr Moyane and whether the relationship had been disclosed when the contract was awarded. SARS wrote to LTC as follows:

‘SARS recently received an enquiry from the Mail & Guardian in which they allege that one of the partners in Lekgotla Trifecta Consortium, Mr Nhlamulo Ndhlela, is a close relative of the Commissioner of SARS, Mr Tom Moyane. The Mail & Guardian is questioning whether, when bidding for the debt collection contract, Mr Ndhlela and/or the Consortium disclosed his family connection with the Commissioner as a potential conflict of interest’.

[17] On 25 August 2016 Mr Marshall, a director of LTC (and of Trifecta Capital Collections (Pty) Ltd) replied to SARS. Amongst other things he said:

‘... we wish to advise and place it on record that neither Mr Ndhlela nor the Consortium was required in terms of law, the relevant practice notes, circulars and/or instructions issued by the National Treasury on supply chain management policy or the request for proposals (RFP) and in particular standard SBD 4 form which bidders were required to complete in relation to declaration of interest issues, to disclose such relationship with the Commissioner.

...

In this regard we wish to point out that, in terms of the SBD 4 form, and in particular paragraphs 1 and 2.9, a bidder is required to make such disclosure only if the person/s to whom he or she is related, “*are involved with the evaluation and/or adjudication of the bid*” or “*may be involved with the evaluation and/or adjudication of the bid*”, respectively. You will appreciate that the provisions of these two paragraphs are contradictory and/or inconsistent. To the best of our knowledge and belief, a person in the Commissioner’s position does not get involved with the evaluation and/or adjudication of bids. Notwithstanding this belief and as a precautionary measure, we sought external legal advice prior to the completion of the SBD 4 form, to the effect that the Commissioner may not be involved in the evaluation and adjudication of the bids.’

[18] On 8 September 2016 Mr Matsobane Matlwa, the Chief Financial Officer of SARS, met with Mr Moyane to discuss the contract with LTC. Mr Moyane gave instructions for the contract to be cancelled, and wrote to Mr Matlwa as follows:

‘It is my considered opinion that SARS has legal and factual basis to cancel this award.’

...

As it emerged during the meeting held on 02 September 2016, one of the successful bidders, Lekgotla Trifecta Consortium, failed to comply with the applicable National Treasury procurement requirements by failing to provide accurate information as per the requirements of **SBD 4: Declaration of Interest** template.

This act, in my view, constitutes misrepresentation and as such provides SARS with legal and factual grounds to cancel this award. A critical consideration to be had in this regard is whether Lekgotla Trifecta Consortium would have emerged as one of the successful bidders had they complied fully with the requirements of **the SBD 4: Declaration of Interest** template.

...

As stated earlier, it remains unwavering conviction that I would have acted differently had I been made aware of what was brought to my attention during the meeting held on 02 September 2016.

...

Lekgotla Trifecta Consortium’s conduct in this regard is likely to create a perception that SARS’s procurement system is not fair nor transparent, and as the Commissioner and Accounting Officer for SARS, this is a risk that SARS cannot afford to accept.’

[19] On 7 October 2016, in response to a letter from SARS, the attorneys for LTC wrote to SARS. Much of the letter is devoted to contending that LTC was not required to disclose the relationship because, so it was said, Mr Moyane had not been a person ‘who may be involved with the evaluation and or adjudication of this bid’ (a reference to the question posed in the SBD 4). It added:

‘Finally, LTC obtained external legal advice on whether it was required to disclose the nature of the relationship. Accordingly, it cannot be said that the non-disclosure was dishonest or fraudulent’.

[20] SARS launched an application in the High Court to set aside the contract, founded upon the failure to disclose the relationship. The application was settled under an agreed order in the following terms:

- ‘2. The applicant’s decision of 17 December 2015 to appoint the respondent to its panel of debt collection service providers in terms of Request for Proposals 28/2015 is reviewed and set aside.
3. The Master Service Agreement in respect of debt collection services concluded between the applicant and the respondent on or about 1 March 2016 is terminated by agreement between the parties.
4. Service Request Number 001 of RFP 28/2015 of on or about 23 May 2016 and any and all other Service Requests issued by the applicant in respect of the respondent in terms of the MSA are terminated by agreement between the parties’.

[21] The award of the contract resulted in benefit being received by Mr Moyane’s nephew. I have found no evidence that Mr Moyane was aware when he approved the award of the contract to LTC that his nephew had an interest, nor that there was any impropriety on the part of Mr Moyane or any other SARS official in the award of the contract.

The New Integrated Credit Solutions Contract

[22] I have already indicated that Mr Moyane approved the appointment of New Integrated Credit Solutions to the panel of service providers on 17 December 2015. Again on 15 February 2018 he approved its appointment for Phase 2 of the project. In each case he did so by signing the report of the National Bid Adjudication Committee. Copies of those approvals are **Appendix 13**.

[23] On 13 March 2018 Mr Moyane appeared before the parliamentary Standing Committee on Finance, accompanied by Mr Lebelo, where he was asked the following questions (a copy of the transcript is **Appendix 14**):

'I just would like SARS or the Commissioner to confirm whether or not New Integrated Credit Solutions have been appointed to conduct debt collection and whether in fact there is the purported link to Mr Makwakwa through Patrick Monyeke and, if so, you know surely that would have disqualified under the present circumstances that we are talking about, that firm from being appointed and is it true they were appointed and is there, can he confirm the purported link to Mr Makwakwa? And if it is true, why did Makwakwa then sit on the National Adjudication Committee apparently, confirm whether or not he did, where the appointment of New Integrated Credit Solutions was made.'

[24] Mr Moyane was a long-standing acquaintance of Mr Monyeke. I have indicated in chapter 4 his role in securing the contract for Gartner. In response to the questions Mr Moyane said the following:

'On the issue of NICS and the linkage with Mr Monyeke, I do not know whether Mr Monyeke is a board member or is a director of NICS, I do not know. All I can say is that I do know Mr Monyeke like any other person that I know. I think it is prudent and therefore important that the Committee can do its homework to prove that he is a director there. Certainly NICS has been doing work with SARS since 2004. They have been doing work with SARS on debt collection. That we have on record.

Now the point that says we may have – the procurement processes at SARS are very clear. There is all the tender processes that are followed and then you have bid evaluation, the bid evaluation committee. The Commissioner does not sit in any of those committee, none at all. The bid adjudication committee which is the NBAC, which is the highest, comprises of all chief officers except the Commissioner and then they take a decision based on the presentation of the bid evaluation committee and they make an announcement and the award of the tender to the preferring tender, tender presenter.

I do not get involved and I do not get informed as to who the companies are, except when they indicate in a meeting that six, eight companies have been submitted and they have been awarded and this is what happens. I do not get involved.'

[25] So far as Mr Moyane conveyed that he had no hand in the appointment of New Integrated Credit Solutions, that is not true. It is also not true that ‘the bid adjudication committee which is the NBAC ... make an announcement and the award of the tender to the preferring tender, tender presenter.’ It is apparent from the documents that, on each of the occasions that New Integrated Credit Solutions was appointed to the panel, and again appointed to Phase 2, the National Bid Adjudication Committee made a recommendation to Mr Moyane, who then approved it by appending his signature to the report. He cannot but have known that the NBAC’s decision was not the end of the process, and cannot but have known that New Integrated Credit Solutions was appointed, bearing in mind that he approved it.

[26] It is also not true that he does ‘not get involved’ in such appointments. His was the final approval for the award of the contract. Indeed, that assertion contradicts the assertion he made in the application to set aside the contract with LTC, the very foundation of which was that he was ‘involved’ in the award of the contract. In his replying affidavit he acknowledged expressly that he had been ‘involved’ in the award of the contract:

‘As a matter of fact, I was “involved with” the evaluation and adjudication of the bids. The National Bid Adjudication Committee’s process resulted in a recommendation made to me in my capacity as SARS’ accounting [officer], which recommendation I personally signed. I was also “involved with” the evaluation and adjudication, in the sense that I am responsible for ensuring that all procurement occurs in accordance with a lawful system, and in that the ultimate recommendations emanating from that system needed my approval’.

[27] The records available to the Commission reflect that Mr Monyeki was never a director of New Integrated Credit Solutions and I have no evidence of any other direct interest. The records suggest that a business relationship of some kind existed in 2015 between New Integrated Credit Solutions and Mahube Payment Solutions, of which Mr Monyeki was then a director (he resigned on 13 February 2017), in that a large payment was made by Integrated Credit Solutions to Mahube Payment Solutions.

[28] I observed earlier that at the outset of the programme, debt to be collected by service providers was confined to Category B debt – debt that was older than four years. In the second phase, unaccountably, the service collectors were appointed to collect debt that was less than four years old. Needless to say, that is the easiest debt to collect, and I have seen no business case made out for that to be allocated to service providers. It is recommended that those contracts be reviewed, and that the use of debt collection services be reviewed to determine whether they add sufficient value to SARS.

CHAPTER 17: MEDIA STATEMENTS

[1] On 10 March 2017 and 18 September 2017 media releases were issued by SARS, which can be taken to have been approved by Mr Moyane, in relation to Judge Davis, chairperson of the Davis Tax Committee and KPMG respectively. Copies of the media releases are **Appendix 15**. They were said by Mr Mathebula to have been prepared by Mr Lebelo, but Mr Lebelo contends, in turn, that responsibility lies with Mr Mathebula. Mr Mathebula submitted a motivated denial that, on the face of it is credible, but we do not think it is a dispute we need to resolve.

[2] So far as the former is concerned, the media release records that it was issued in response to statements said to have been made by Judge Davis in an address to a conference on tax evasion and illicit financial flows, in his capacity as chairperson of the Davis Tax Committee. The statements were recorded in the media release as follows:

‘1.1 That the biggest challenge facing South Africa today is an erosion of the integrity of SARS;

1.2 That SARS has no capability of actually dealing with multinational corporation and capital that seeks to evade tax;

1.3 That he disagrees with the number 103000 that falls into the new top marginal tax bracket of 45% and that he knows more people on the Johannesburg Bar earning R5 million a year than the tax table show. Further, that wealthy individuals are managing to escape the tax net and SARS is disingenuous to blame it on the economy;

1.4 That we know the revenue is down by R14Bn on personal income tax. The Commissioner for SARS suggests that that is because of a downturn in the economy, Unfortunately for the Commissioner for SARS, corporate tax went up by R6.5bn.

1.5 That the recent tax amnesty as implemented in terms of the Voluntary Disclosure Program (“VDP”) will flop if tax dodgers were no longer scared of SARS; and

1.6 That some years ago, when SARS actually had a reasonably good transfer pricing unit, it audited 40 companies to see what the effect of a seriously audit would be. It collected R1.1 billion on one audit in one year. We are talking about a lot of money.’

[3] There was some justification for all those statements. Integrity was indeed being eroded, as I have indicated in various parts of this report. With the evisceration of the LBC and the departure of skilled employees SARS had indeed lost at least much of its capability to deal with multinational corporations that sought to evade tax. No doubt he had reason to disagree with the number falling into the new top marginal tax bracket, and many members of the Johannesburg Bar do earn R5 million a year (contrary to what was asserted, the statement attributed to Judge Davis does not suggest they evade tax). Wealthy individuals are indeed managing to escape the tax net, and it is indeed disingenuous to blame it on the economy. As I have indicated elsewhere in this report, the shortfall of Personal Income Tax was approximately R16 billion and Corporate Tax was up R6.1 billion. A tax amnesty will indeed flop if tax dodgers are not afraid of SARS. It is not clear what years was being referred to in which R1.1 billion was said to have been collected in one audit, but it is credible that that indeed occurred when the LBC was functional.

[4] Be that as it might, even if there were errors in what was said, that would be deserving of no more than mature correction. What was said instead was that Judge Davis was fabricating with a nefarious motive, that he had 'publicly misled the public', that it was 'suspicious' that he had ignored facts alleged by SARS, that he had been dishonest, that it was 'shocking' that he was supported by two former employees of SARS who were alleged to have acted unlawfully, that Judge Davis had made himself party to a 'systematically orchestrated narrative' that sought to undermine the leadership of SARS so as to engulf SARS in a crisis of lack of public confidence and illegitimacy, that judge Davis had for some time 'behaved in a manner that could be perceived as advocating a veiled strategy to mobilise a tax revolt.

[5] I need say no more than whatever grievance might have been held against Judge Davis, this was a scurrilous attack that had no place emanating from SARS.

[6] The media release relating to KPMG reflects the fury of Mr Moyane at KPMG distancing itself from the allegations that had been made in its report, and the reason is

obvious. The report having played its role in discrediting Mr Pillay and others, Mr Moyane would tolerate no suggestion being made to the public that the recommendations in the report were not justified. Once again, the denunciation of KPMG was not only misguided, in that the contract did not somehow set the views of KPMG in stone, but also vilified KPMG to the discredit of SARS.

[7] What is disturbing about the release is its intent on keeping alive in the public mind the discrediting of Mr Pillay and others, as it was sought to be kept alive by Mr Lebelo in his evidence before the Commission, and by those who circled and sought to discredit the Commission. It has become perfectly clear in the course of this inquiry that SARS is still plagued by factional politicisation and intrigue that entered SARS with Mr Moyane's appointment and it is set still to plague SARS. Without that politicisation being rooted out of SARS there is no prospect of its credibility being restored.

[8] On 28 November 2016 Mr Lebelo wrote a letter to the Business Day, in his personal capacity, railing at the rating agencies as 'gangsters', which is included in **Appendix 15**. It is clearly contrary to government policy that the rating agencies should be berated, and it is also damaging for vitriol of that kind to emanate from SARS, bearing in mind that the state of SARS is one of the considerations relevant to the country's sovereign rating.

[9] In explanation Mr Lebelo told the Commission he has an interest in political writing, and that there was nothing untoward in a government employee holding political views, and expressing them in their personal capacity. He said he was nonetheless reprimanded by Mr Moyane and has not repeated it. If Mr Lebelo was indeed reprimanded, nothing was done to restore the credibility of SARS in the public mind.

[10] No doubt it is correct that government employees may hold political views, but I do not accept that a senior government employee is free to express them unrestrained,

even in his or her personal capacity. Mr Lebelo must have known full well that he would readily be identified as a senior employee of SARS, which was demonstrated when his railing was elevated from the letters page of the Business Day to the news pages of the media, and every employee of SARS is bound not to bring SARS into disrepute.

[11] In my view Mr Lebelo brought SARS into disrepute by publishing his letter concerning the rating agencies. That he was protected from disciplinary action while Mr Moyane was in office is every reason why appropriate disciplinary ought now to be considered.

[12] So far as the media releases are concerned we are not in a position to resolve the dispute between Mr Lebelo and Mr Mathebula, but we recommend that disciplinary action be considered against any executive for publishing the media statements. It is further recommended that any such executive be deprived of any authority he or she might have to speak on behalf of SARS without the approval of the Commissioner.

CHAPTER 18: SARS AND OTHER STATE INSTITUTIONS

[1] The effective functioning of SARS 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.

[2] The media statement issued in relation to the chairman of the Davis Tax Committee is sufficient to demonstrate that that relationship has broken down. According to Judge Davis, the Committee was 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.

[3] We recommend that SARS take steps to restore the cordial relations that formerly existed with other state institutions including the National Prosecuting Authority, the Financial Intelligence Centre, the Auditor-General and the National Treasury, and develop protocols for interaction with the National Treasury.

CHAPTER 19: INTERNATIONAL RELATIONS

[1] At 1 April 2014 SARS had a long-standing and valuable relationship with the Organisation for Economic Co-operation and Development, a Paris-based inter-governmental organisation. In 2007 South Africa was designated a key partner of the OECD, together with Brazil, China, India and Indonesia.

[2] The history of its relationship, and the key role played by SARS, is related in a note prepared by the OECD's Centre for Tax Policy and Administration, which is **Appendix 16**, and need not be repeated. Mr Kosie Louw, former SARS Chief Officer: Legal Counsel, completed his second term as Chairperson of the OECD Global Forum on Transparency and Exchange of Information for Tax Purposes in 2017. By 31 March 2018 the relationship with the OECD had all but ceased to exist.

[3] The value to SARS of associating itself with the OECD will be apparent from that note, and it is recommended that SARS take steps to resume that association.

[4] During Mr Gordhan's tenure as SARS Commissioner, he served an unprecedented five terms as Chairperson of the World Customs Organisation (WCO) Policy Commission. Since 2009, SARS continued to represent South Africa as a member of the WCO Policy Commission through its position as Vice Chair of the WCO Eastern and Southern Africa (ESA) chapter. However, in 2017, South Africa could not muster sufficient votes to retain the Vice Chair of the WCO ESA chapter membership and lost its membership of the WCO Policy Commission.

CHAPTER 20: A MASSIVE FAILURE OF GOVERNANCE – NEVER AGAIN

Introduction

[1] There can be little doubt that the catastrophe at SARS is attributable to a massive failure of elementary principles of governance coupled with pervasive breaches of integrity. It follows that the prevention of a recurrence requires a relook at the relevant legislative provisions relating to the governance at SARS.

[2] The importance of effective governance at SARS cannot be overstated. It is an essential pillar for the effective and efficient operations of SARS. It's impact is felt in the overall performance of SARS, including, most importantly, in revenue collection. It also impacts on the budgetary process of SARS as an institution and indeed of the nation. Taxpayer morality is also materially affected by these considerations.

[3] Elsewhere in this Report attention is drawn to facts which manifest a failure of governance at SARS. The purpose of this Chapter is to analyse the legislative and other actions to be taken to enhance and improve governance at SARS.

[4] The factors referred to in paragraphs [5], [6], [7], and [8] below have been identified as being of importance by the OECD in its publication entitled "Tax Administration 2018 – Comparative Information on OECD And Other Advanced and Emerging Economies". In addition, Mr Pascal Saint-Amans, The Director for The Centre For Tax Policy And Administration at the Organization For Economic Co-Operation And Development ("OECD") provided most useful input to the Commission on the administration of tax collecting institutions. Mr Saint-Amans has also drawn attention to Chapter 3 of the OECD Tax Administration Series 2017 (based on 2015 data) which sets out some of the different institutional arrangements involving tax administration of countries that are members of the OECD Forum on Tax Administration ("FTA"). The

most common institutional models and arrangements are included in those set out in paragraphs [5], [6], [7], and [8] hereunder.

[5] The most common institutional models are :-

1. A unified semi-autonomous body. There are two main forms. First, where the tax administration and support functions are the responsibility of a Commissioner or Director General who reports to a Government minister (24 FTA members). Second, where the Commissioner or Director General reports to a Board (10 FTA members). No such Boards appear to have a role in exercising any statutory tax powers nor do they have access to taxpayer specific information.
2. A single directorate or unit within the Ministry of Finance or its equivalent reporting through the Finance Ministry structure (around 13 FTA members).

[6] Some of the other more material aspects relating to governance of tax administrations to which Mr Saint-Amans draws attention are the following:

1. the Head of State will often have the authority to both appoint and dismiss the Commissioner with various levels of consultation and liaison with senior officials and Ministers of Finance. In many cases, appointments of Commissioners are made on a fixed term basis. Provisions for removal are not usually statutory but more commonly provided for in the terms of the Commissioners' contracts, including performance requirements. (These may or may not be public.);
2. administrations generally have robust internal controls built into their IT framework to detect and prevent internal fraud, as well as internal audit functions. There are clear HR policies to deal with employee misconduct. (All FTA members have formal internal assurance mechanisms; 48 FTA

members have a public service wide code of conduct; and 45 have their own code of conduct);

3. most administrations are subject to a degree of oversight by a public accounts committee (or equivalent) that assesses their results and a budgetary review process that monitors their spending. (49 FTA members have an external auditor.) Results are typically reviewed and verified by a national audit function. Parliamentary committees will also usually have the capacity to review performance against output metrics, as well as more strategic goals.

[7] The common oversight features of members of The Forum Of Tax Administration of the OECD include the following :-

1. government oversight of the budgetary approval and review process;
2. annual report audited by an independent national audit function. (Almost all FTA members publish an annual report; and 49 have an external auditor);
3. internal accountability and control frameworks with automatic checks to prevent internal fraud;
4. periodic assessments against agreed metrics (e.g. revenue raised, debt levels, number of compliance interventions, customer service levels). (46 FTA members prepare a formal set of service delivery standards; 43 make the set of delivery standards public; 31 publish results;
5. an agreed set of strategic goals and objectives to guide their performance. High level outcome measures and indicators used by revenue bodies generally encompass the following:-
 - 5.1 taxpayers' satisfaction with the services provided and overall perceptions of the tax administration's competence as an efficient, fair and effective;

- 5.2 taxpayers' compliance;
- 5.3 taxpayer service delivery, including the use of modern electronic services;
- 5.4 organisational efficiency; and
- 5.5 employee engagement and satisfaction.
- 5.6 The presence of a Board or Executive Committee to review, assess, and challenge strategic direction; and
- 5.7 independent risk assessment of the accountability and control framework, including both performance and financial reporting, systems of risk oversight and management and system of internal control. (All FTA members have formal internal assurance mechanisms).

[8] In addition to the foregoing, Mr Saint-Amans draws attention to the following features of core elements of tax governance of countries that are members of the Forum of Tax Administration of the OECD :-

Appointment and removal of the Commissioner

1. Appointment of the Commissioner is usually a political decision made by relevant Ministers (or Heads of the Executive branch or Heads of State). In some cases there are specific legal limitations to removing a Commissioner from office (such as incapacity to serve or misconduct), while in other cases grounds for dismissal may be set out in the terms of appointment or there may be no limitation (other than judicial review).
2. The integrity of those taking the decisions in most countries and the various checks and balances to ensure that the process is fully fair and transparent is sufficient in most cases to ensure proper outcomes regarding the appointment and removal of Commissioners. Where there is less confidence in the continuing robustness of those checks and balances,

jurisdictions may wish to consider the introduction of legal safeguards and robust independent processes governing the appointment and dismissal of Commissioners.

Powers of the Commissioner and accountability

3. Commissioners in a number of countries have extensive powers provided in law or delegated from a Minister to oversee the organisation and day-to-day management of the tax administration. Powers may also be delegated to make certain types of statutory instrument (although not the creation of new taxes).
4. In practice, Commissioners operate through delegating their functions to Deputy Commissioners, senior officials and senior committees. This usually includes decision making as regards strategic direction and the operation of cross cutting functions.
5. The decision making structure for the organisation:-
 - 5.1 can be set out in legislation to a greater or lesser degree; and/or;
 - 5.2 can be set out in policy documents or Memorandums of Understanding which may require, for example, the approval of a Minister, Parliament, or an administration's Board.

Ministerial powers

6. Ministerial powers as regards tax administration are often limited by legislation or case law. These limitations will generally be around Ministerial involvement in individual taxpayer assessments. In some cases Ministers will be able to exercise powers where the tax administration is not meeting its objectives or impacting adversely on the public good. These may either be powers to direct the Commissioner or powers to suspend or remove the Commissioner.

There can be a tension here between sufficient powers being available in case the Commissioner is not fulfilling his duties properly and limitations

on those powers to ensure that there is no adverse political influence on the administration of tax. Having limitations on the use of Ministerial powers set out in legislation or in a Memorandum of Understanding and/or having external scrutiny of decisions (for example through Parliamentary committees or the judiciary) can provide an extra layer of protection in appropriate circumstances.

Separation of functions: Ministry of Finance and Parliament

7. Functions are usually separated along the following lines :-
 - tax policy and draft legislation – the Ministry of Finance;
 - passage of legislation and a range of oversight functions – Parliament; and
 - administration of tax law, usually with some informal function in advising on tax policy – the tax administration.
8. This division appears to be followed in most countries. The main differences will be in the nature of oversight by the Ministry of Finance and Parliament of the tax administration. This is usually multi-layered with a number of different independent and non-statutory bodies looking at different elements of administration, including budget, value for money, propriety and efficiency. In some cases, this includes an independent statutory agency tasked with identifying possible issues in tax administration separate to tax policy, and reporting to Government with recommendations for improvements. This level of external scrutiny is an important part of the checks and balances ensuring fair, stable and well-run tax administration.

Role and appointment of Boards

9. In the 2017 OECD Tax Administration Series (TAS) publication it was reported that 10 tax administrations operate with a Board, half with a decision-making Board and half with an advisory board.

10. Where there are issues around credibility and confidence in the tax administration, this kind of external governance arrangement may play an important role. In the TAS, tax administrations reported that such bodies :
 - execute general oversight;
 - play a role in strategy development and planning;
 - comment and provide advice on major operational policy reviews; and
 - are involved in the sign-off of formal budgets and business plans.
11. There does not appear to be any consensus on the size of boards but most jurisdictions reported that they usually consist of both Ministry and tax administration officials which public boards include external representatives from various sectors. In some administrations Board decisions are made public.

Objective setting

12. While tax administration functions and duties are set out in legislation, tax administrations will generally set out their objectives for the year ahead (or for a longer period). This will often be agreed by the Ministry of Finance and reported to Parliament and the general public.

HR policies

13. Many administrations have compulsory ethics training for all employees and require staff to sign an ethics declaration, the breach of which can lead to disciplinary action and dismissal.
14. It is also common practice for senior employees and those in positions of influence (typically those making procurement decisions) to have to make an annual declaration of any interests outside of the tax administration, and to notify their employer of any potential conflicts of interest.

[9] Prior to dealing with these issues it is appropriate to deal with :-

1. certain background materials including –
the approach of the Katz Commission; and
the approach of the Davis Tax Committee;
2. the existing legislative provisions relating to –
the structure of SARS; and
the appointment and removal of the Commissioner.

[10] For the purposes of dealing with these issues the Commission has received valuable submissions, including most importantly from :-

1. the National Treasury through its Deputy Director-General Mr Ismail Momoniat;
2. the Davis Committee through its Chairman Judge Dennis Davis; and
3. the Acting Commissioner Mr Mark Kingon.

[11] The Commission is of the fervent view that no provisions relating to the governance of SARS should be considered, let alone adopted, which could have the impact of infringing on the autonomy of SARS. It is a non-negotiable proposition that SARS' autonomy is sacrosanct. This truism was identified as such by the Katz Commission in its First Interim Report (November 1994).

[12] The sacrosanctity of autonomy at SARS must, however, be reconciled with the reality that the national budget and tax policy is the responsibility of executive government and the management of the country's finances vests in the Ministry of Finance.

The Approach of the Katz Commission to the Optimum SARS Model

[13] In Chapter 3 of the Interim Report of the Commission of Inquiry into Certain Aspects of the Tax Structure of South Africa the approach to the modernization of tax administration is fully reasoned. It also draws on comparative literature in other countries including developed and developing.

[14] The Katz Commission refers at length to the works of Glenn P Jenkins “Modernisation of Tax Administrations: Revenue Boards and Privatisation as Instruments for Change”, in the Bulletin for International Fiscal Documentation, February 1994 : 75-81.

[15] The fundamental pillar of the Katz Commission recommendations is autonomy and independence for tax administrations. This is reflected in paragraph 3.13.5 of the Katz Commission Report, which reads as follows :-

“3.13.5 Modernisation of tax administration to give effect, *inter alia*, to the needs for institutional autonomy and a professional personnel corps, requires legal, administrative and organisational reforms which take account of local circumstances. The Commission does not view its task as encompassing detailed proposals on appropriate institutional reforms. The Commission recommends, however, that the following broad principles should inform Government’s restructuring of tax administration in South Africa :

- (a) independence of the revenues authorities, including responsibility for their own budgetary allocation and control, administrative policies and objectives, and recruitment, training, remuneration and codes of conduct for personnel;
- (b) oversight by statutory boards responsible for Inland Revenue and Customs and Excise, appointed by and answerable to Parliament

through the Minister of Finance;

- (c) Maintenance of unified Inland Revenue and Customs and Excises departments, with responsibility both to the national and provincial governments for all aspects of tax collection; and
- (d) contracting out, where appropriate, of certain administrative functions, such as computer services, warehousing of documentation and customs merchandise, printing and distribution of tax returns and notices, preparation of tax manuals and documentation and collection of minor taxes.”

[16] The Katz Commission also heavily focused on Jenkins’ submissions in support of autonomy of the tax administration and professionalism in tax administration. Paragraph 3.14.4 of the Katz Commission Report reads as follows –

“13.4.4 An important outcome of administrative reforms in the UK Revenue has been the virtual elimination of late assessments, both of individuals and of companies. Targets are set for processing and recovery work and provide benchmarks against which performance is assessed within divisions and across tax offices. Progress in eliminating backlogs has enabled the Revenue to move on to targeted improvements in customer service and cost efficiency of operations. A deliberate policy of caring for staff through attention to working conditions, training, health screening, equal opportunities promotion and pay and performance management, amongst other measures, has contributed to the reduction in the staff resignation rate from over 6 percent in 1988 to just 2 percent per year in 1993.”

The Approach of the Davis Tax Commission to the Optimum SARS Model

[17] On 29 July 2016 the Davis Tax Commission the (“**Davis Committee**”) received certain additional terms including “to enquire whether the governance and

accountability model for SARS as set out in the Report of the Katz Commission of Inquiry remains appropriate for South Africa in 2016 and make proposals on an appropriate governance and accountability model.

[18] On 12 October 2017 the Davis Committee presented a Report on various aspects of tax administration to the Minister of Finance.

[19] In response to the additional terms of reference referred to in paragraph [16] above the Davis Committee endorsed the Katz Commission's recommendations regarding the autonomy and independence of the Revenue Authorities and the approach of the Katz Commission to the structural independence of SARS.

[20] As regards the appointment of the Commissioner the Davis Committee recommended that :-

1. the Commissioner should be appointed in a manner similar to the appointment of the Public Protector;
2. alternatively, that the Commissioner be appointed by the Minister of Finance. In this regard paragraph 39 of the Davis Committee Report on Tax Administration reads as follows :-

"39 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.”

[21] The Davis Committee also recommended 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 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 :-

“40 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 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.”

The Existing Legislative Structure of SARS

[22] The South African Revenue Service is established as an organ of state within the public administration but as an institution outside the public service, the objective of which is the efficient and effective collection of revenue⁴.

[23] Section 4 (1) of the SARS Act clearly states that, to achieve its objective, SARS must :-

1. secure the efficient and effective, and widest possible, enforcement of –

the national legislation listed in schedule 1;

any other legislation concerning the collection of revenue or the control over the import, export, manufacture, movement, storage or use of certain goods that may be assigned to SARS in terms of either legislation or an agreement between SARS and the organ of state or institution concerned;
2. advise the Minister at the Minister’s request on –

all matters concerning revenue; and

the exercise of any power or the performance of any function assigned to the Minister or any other functionary in the national executive in terms of legislation referred to in paragraph [22];

⁴ Refer to paragraphs 37-40 on pages 17-19 of the Davis Tax Committee Report : September 2017

3. SARS must perform its functions in the most cost-effective and efficient manner and in accordance with the values and principles mentioned in section 195 of the Constitution.

The Existing Legislative Provisions Relating to the Appointment and Removal of The Commissioner

[24] Section 6 of the SARS Act clearly states that the President must appoint the Commissioner, (my emphasis). Accordingly, only the President can remove him from office. Prior to the amendment of the SARS Act, 1997, the Commissioner for SARS was appointed by the Minister of Finance⁵.

[25] Section 9 of the SARS Act sets out **the Commissioner's responsibilities** as follows :-

“9(1) The Commissioner -

- (a) is responsible for the performance by SARS of its functions;
 - (b) takes all decisions in the exercise by SARS of its powers;
 - (c) performs any functions and exercises any power assigned to him in terms of any legislation and agreement referred to in section 4(1) (a).
- 2) As the Chief executive officer, he is responsible for the formation and development of an efficient administration, the organisation and control of staff, the maintenance of discipline; and the effective deployment and utilisation of staff to achieve maximum operational results⁶.
 - 3) As accounting officer, he is responsible for all income and expenditure for

⁵ Refer to section 6(1) of the SARS Act, 1997

⁶ Refer to Section 9(2)(a-d) of the Act, 2002

SARS, all revenue collected by SARS, all assets and the discharge of all liabilities of SARS, and the proper and due diligent implementation of the Public Finance Management Act⁷.

- 4) The Commissioner must perform the functions of the office as required by this Act.”

The Existing Legislative Provisions Relating to the Powers of the Minister of Finance

[26] In terms of section 7(1), the Minister may designate another SARS employee to act as Commissioner for SARS when the Commissioner is absent or unable to perform his functions of office.

[27] The Minister may also appoint one or more specialist committees to advise the Commissioner and the Minister on any matter concerning the management of SARS resources, including asset management, human resources and information technology, subject to subsection (2)⁸.

“(2) The specialist committee responsible for human resources must advise -

-
- (a) the Minister on matters concerning the terms and conditions of employment of any class of employees in the management structure of SARS, as agreed between the Minister and the Commissioner, and
 - (b) the Commissioner on matters concerning the terms and conditions of employment of all employees of SARS, other than employees contemplated in paragraph (a).”

⁷ Refer to Section 9(3)(a-d) of the Act, 2002

⁸ Refer to Section 11(1) of the Act

[28] With regard to employees, the Minister must approve the terms and conditions of employment for any class of employees in the management structure of SARS⁹.

[29] While there may have been a rationale for the amendments to the SARS Act, the Commission is of the view that the amendments were made prematurely. The country had just attained its freedom and the Government of national unity was still at its infancy and seemed to be working well. There was mutual cooperation and understanding between the Minister of Finance and the previous Commissioners for SARS up until September 2014. Although the previous Commissioners for SARS were appointed by the President, in terms of the SARS Act, 2002, they fully appreciated the important role which was played by the Finance Ministry in assisting SARS to achieve its objectives thus ensuring that the Finance Ministry also achieves its fiscal objectives¹⁰.

[30] 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 and the Finance Ministry had continued to apply these principles, the Commission believes that a number of the unfortunate events and reputational damage which took place at SARS between 2014 and March 2018, which did serious damage to the organisation may not have occurred.

[31] The Act, in its current form, 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 for SARS to the Minister of Finance. Suggestions

⁹ Refer to Section 18(3) of the SARS Act

¹⁰ It should be observed that the previous Minister of Finance, Mr Gordhan was appointed by the Minister of Finance in terms of the SARS Act, 1997. However, Commissioner Magashula was appointed by the President in terms of the SARS Act, 2002. The appointment process leading to his appointment was undertaken by the Minister of Finance. This was not the case with Commissioner Moyane

as to the level of accountability by the Commissioner to the Minister are set out hereunder.

Suggestions Made In Respect Of The Possible Appointment Of An Oversight Board

[32] As mentioned there are a number of foreign jurisdictions that employ an oversight board of independent outsiders as a mechanism for enhancing governance at their tax collecting institutions. This idea of an oversight board was also mentioned in evidence to the Commission as a possible instrument to enhance governance.

[33] The Commission is not persuaded that an oversight board is indeed a useful instrument. It has a number of serious deficiencies stemming primarily from the fact that SARS does fundamentally, in its structure, purpose and function differ from the conventional company in the private sector. Thus, the analogy of the role and usefulness of a private sector company board, with independent non-executive directors, does not provide a useful point of departure.

[34] The board of a private sector company has a familiarity with the purpose, function, structure and activities of the company. As such they can provide a useful oversight function over the company's senior executives. This cannot in reality happen in the case of a board of oversight of SARS where the directors who would populate such board neither have a grasp of the true purpose and functions of SARS nor its crucial involvement as part of the management of the country's finances. There could also be unintended involvement in tax policy or indeed taxpayer affairs both of which would be highly undesirable.

[35] In another context in evidence before the Commission the reality of the difference between SARS and a conventional private sector company was forcefully driven home. One of the consultants employed by SARS criticised certain investment decisions of SARS as part of its modernization programme on the basis that such investment did not provide an appropriate return on capital. The response to this is that the criticism of the consultants may or may not have been correct if the sole basis for assessing the investment decision of SARS is whether it meets the conventional criteria in relation to its impact on SARS. However, when it comes to judging the investment decisions of SARS they are required not only to meet the narrow test of their impact on SARS but also the broader test of their impact on the economy. Steps taken, for example, to ease the completion of tax returns or determining whether VAT refunds are due, assist the entire economy and will thus have the added benefit of expanding the tax base.

[36] Most importantly a board with independent outsiders would not have had the skill, ability or access to have detected and help prevent the serious governance failures that had occurred at SARS. More about this appears in the provisions of this Report which deal with the Appointment of An Inspector General. In this regard the poor performance of the so called Kroon Advisory Board is simply an illustration which supports the Commission's reticence about the value of boards in enhancing governance at SARS.

[37] As appears elsewhere in this Report certain enhancements of governance at SARS should more appropriately be provided by :-

1. the Minister of Finance, in certain instances; and
2. the Inspector General, in other respects.

The Office Of The Tax Ombud

[38] Insofar as concerns the office of the Tax Ombud the Commission has full admiration for the valuable role played by the Tax Ombud. However, its mandate is at present confined broadly to addressing taxpayer rights. The Commission is of the view that this is the appropriate role for the Tax Ombud and that it should not be involved in governance at SARS.

Proposals For The Enhancement of Governance At SARS By The Granting Of Powers To The Minister of Finance

[39] The participation by the Minister of Finance in certain aspects of the governance of SARS is a reality that must not be viewed as a detraction from the autonomy of SARS. As has already been observed the national budget and tax policy is the responsibility of executive government and the management of the country's finances vests in the Ministry of Finance. Having regard to this reality it is the Commission's recommendation that various amendments should be made to the SARS Act to give additional powers to the Minister of Finance. These suggestions would include those set out hereunder.

[40] First we deal with the appointment of the Commissioner. At present that power of appointment of the Commissioner vests in the President. There are differing views as to whether that power should continue to vest in the President or whether it should be moved to the Minister of Finance. In a sense it might be said to make no difference, since the Minister himself is an appointee of the President. Our view is that the Commissioner of SARS should be appointed by President, after consultation with the Minister of Finance, according to a transparent process. The process should be along the following lines :-

1. the President should of his own volition select, or upon nominations, select a candidate or candidates for appointment;
2. following the selection by the President of the candidate or candidates it should be followed by an open and transparent process for the purposes of providing input to the President, or the Minister, as to the suitability for office of the candidate. This process should be apolitical and the persons providing the input should be selected on their personal merits including impeccable reputation and probity, and not on the basis of being a representative of any organisation;
3. the candidate or candidates of the choice of the President or Minister, as the case may be, should be subjected to interview by an apolitical panel comprising persons of high standing who inspire confidence across the tax-paying spectrum;
4. there should be criteria against which to evaluate the attributes of the candidate or candidates and the members of the panel;
5. as regards the suitability of the persons to be considered as candidates for appointment as Commissioner the criteria against which the candidate or candidates should be evaluated for suitability should be :-

first and foremost, he or she must be, and must be reputed to be, of unblemished integrity;

he or she must have proven experience of managing a large organization at a high level; and

he or she must not be aligned to any constituency, and if so aligned, he or she must renounce that alliance upon appointment.
6. once a candidate is appointed the recommendations of the panel should be made public.

[41] Secondly, we deal with the power of removal of the Commissioner. The legislation should, for the foregoing reasons, vest such power in the President. Such power should only be capable of being exercised on grounds specified in the legislation and in accordance with a process also specified in the legislation. In formulating such legislation dealing with the grounds and process for the removal of the Commissioner care should be taken to achieve the correct balance between upholding the autonomy of SARS and the ability to remove an incumbent Commissioner whose continuing incumbency undermines the efficiency and efficacy of SARS and thus the country. There should also be a power of suspension to be exercised by the Minister in appropriate circumstances pending the process of removal.

[42] Thirdly, as regards the appointment of the Executive Committee (“**EXCO**”) it is appropriate that the Commissioner should determine the composition of his own EXCO and select the persons who will hold the posts on EXCO. This accords with the general practice in private sector companies. However, an EXCO should be mandatory, and the Deputy Commissioner should be required to be a member of EXCO.

[43] Fourthly, the determination of the remuneration of the Commissioner and his EXCO should, to the extent that there is any doubt in the existing legislation, make clear that the prior approval of the Minister is a requirement. This is in recognition of the basic principle that a serious conflict of interest exists in the Commissioner, either on his own, or with his EXCO colleagues, determining the remuneration of all or any of them.

[44] Fifthly, the formulation by the Commissioner of the business plan for SARS should require the approval of the Minister. Similarly, any variation of the approved business plan should require the Minister’s approval.

Proposals For The Enhancement Of Governance At SARS By The Appointment Of An Inspector General

[45] It is the strong view of the Commission that a fundamentally important part in the enhancement of governance at SARS will be achieved by the appointment of an Inspector General (“IG”) having the responsibilities and powers as set out hereunder. This role properly performed, had it been in place during Mr Monyane’s incumbency, would in all probability have prevented much of the damage and destruction which the Commission has outlined in its interim report.

[46] The SARS Act should be amended to make provision for the appointment, for a specified period, of an IG along the following lines:-

1. the appointment should be made by the Minister of Finance in accordance with an open and transparent process;
2. the proposed appointee should be required to pass the test of being fit and proper and should have the following qualifications:
 - a good stature and reputation, preferably a retired judge or senior legal practitioner;
 - a good knowledge of legal principles and processes;
 - the requisite experience in administrative issues; and
3. the IG should have wide powers to perform the functions envisioned hereunder.

[47] It is contemplated that the IG would, on a routine basis, conduct enquiries from time to time at all levels of SARS. Such enquiries would ordinarily include conducting interviews with executives and employees to enable the IG to determine the general

state of health of SARS and to uncover any particular event, action, or state of affairs that comes to the attention of the IG.

[48] In addition to the conducting of enquiries on a routine, or *ad hoc* basis, as initiated by the IG, the IG should also be available to be interviewed by persons inside SARS or outside of SARS, being either individuals or representative bodies such as the Institute of Chartered Accountants. This access to the IG by outsiders should help uncover any malaise that exists at SARS which insiders at SARS might otherwise have closed ranks and suppressed.

[49] The IG would enjoy powers to perform the functions contemplated above including access to documents and the power of subpoena. Naturally provision would be made to protect taxpayer confidentiality.

[50] If the IG discovers or uncovers areas of concern the IG would raise these concerns in the first place with the Commissioner. If the Commissioner does not adequately satisfy the IG's concerns the IG would have the power to escalate the matter to the Minister of Finance. If the Minister of Finance is implicated then the IG must have the power to escalate the matter to the President and if necessary to Parliament.

[51] The foregoing must not be regarded as being exhaustive. The proposed legislation suggested by the Commission will take cognizance of the Commission's objectives as described herein.

Proposals Relating To The Appointment Of A Deputy Commissioner

[52] It is the considered view of the Commission that it would be advantageous for the SARS Act to be amended to make provision for the appointment of a Deputy Commissioner.

[53] The process for the appointment and removal of a Deputy Commissioner would be broadly the same as that applicable in the case of the Commissioner.

[54] The Deputy Commissioner would be a member of EXCO but there would not be a reporting line by any executives to the Deputy Commissioner. The Commissioner would ordinarily delegate functions to the Deputy Commissioner.

[55] The main advantage of having a Deputy Commissioner is to provide continuity in the event that the Commissioner is unable due to incapacitation or any other reason to perform the functions of the Commissioner. Also, in the event that the Commissioner's appointment ceases for any reason and a replacement becomes necessary the Deputy Commissioner would be a strong candidate, although not automatic, for the position of Commissioner. This would best achieve continuity and the preservation of institutional knowledge. In addition in certain of the cases where tax legislation confers a discretion in favour of the Commissioner, the involvement of the Deputy Commissioner may be a useful safeguard to ensure the optimum exercise of the Commissioner's discretion. Another advantage of having a Deputy Commissioner is that it will provide a further filter against the unfettered exercise of power by the Commissioner. The presence of a person of stature on EXCO who cannot be unilaterally dismissed by the Commissioner could temper injudicious, and otherwise unchallenged, conduct by the Commissioner. It is not contemplated that the Deputy Commissioner would strengthen governance in

those areas where the enhancement of governance will be the responsibility of the Minister of Finance or IG as outlined elsewhere in this Report.

RECOMMENDATIONS

1. **Chapter 3 : The Seizing of SARS**

- 1.1 In paragraph [69] it is recommended that National Treasury should review the procurement process where multiple contracts are envisaged for a project to prevent the abuse arising from 'loss leaders' at the outset.
- 1.2 In paragraph [75] it is recommended that the National Director of Public Prosecutions should consider prosecutions in connection with the award of the Bain & Co. contracts.

2. **Chapter 4 : The Fabric of the SARS Restructuring**

- 2.1 In paragraph [13] it is recommended that the Large Business Centre be re-established.
- 2.2 In paragraph [30] it is recommended that the Compliance Unit be re-established, and that a high-level Integrity Unit be established.

3. **Chapter 5 : Information Technology and the Gartner Contracts**

- 3.1 In paragraph [12] it is recommended that the new Commissioner of SARS recruit one or more suitably qualified persons from within or outside SARS to be placed in a position to take control of SARS information technology and to develop and implement a strategy to renew development of information technology.

- 3.2 In paragraph [42] it is recommended that SARS considers commencing proceedings to set aside the contracts and to recover expenditure incurred that added no value to SARS.

4. **Chapter 6 : Resignation of Senior Employees**

In paragraph [63] it is recommended that the new Commissioner of SARS evaluates employees in supernumerary posts and considers their placement in positions in which they are able to add most value to SARS. It is recommended as well that posts in the establishment be evaluated and, where appropriate, active steps be taken to recruit former employees to those posts. It is further recommended that SARS consider possibilities for reparation though not necessarily in pecuniary terms.

5. **Chapter 7 : The New EXCO**

- 5.1 In paragraph [46] it is recommended, albeit that it is an operational matter, that the new Commissioner of SARS conduct a performance review of EXCO members appointed by Mr Moyane, taking account of their capacity for senior management, their appreciation of good governance, and their capacity for inspiring public confidence in the integrity of SARS, bearing in mind the matters dealt with in this report.
- 5.2 In paragraph [46] it is recommended that the remuneration and benefits of EXCO members who were appointed without ministerial approval of their terms of appointment be reviewed, and be referred to the Minister of Finance to consider whether to grant approval, and that the benefits accorded to members of EXCO be reviewed.

6. **Chapter 8 : The Anti - Corruption and Security Unit and Related Events**

In paragraph [27] it is recommended that SARS re-establish capacity to monitor and investigate the illicit trades, in particular the trade in cigarettes, within appropriate governance structures.

7. **Chapter 10 : VAT refunds**

In paragraph [6] it is recommended that SARS urgently undertakes an operational investigation for the purpose of correcting systemic obstacles preventing the prompt refunding of VAT that is due.

8. **Chapter 11 : Litigation**

In paragraph [26] it is recommended that SARS takes steps to recover from the former Commissioner legal costs and expense incurred by SARS for litigation commenced and instructions given as set out in that chapter.

9. **Chapter 12 : Settlements**

In paragraph [14] it is recommended that the terms of reference of bodies authorised to settle claims be reviewed to ensure and, if necessary, strengthen governance mechanisms.

10. **Chapter 13 : Bonuses**

In paragraph [24] it is recommended that section 18(3) of the South African Revenue Service Act be amended to clarify that the terms and conditions of employment of employees in the senior management structures of SARS include remuneration, bonuses, and all other benefits of their employment, and alterations to those terms of employment.

11. Chapter 14 : Taxpayer Affairs

In paragraph [6] it is recommended that the case selection and audit protocols be reviewed to consider further protocols to ensure proper investigation of tax returns with reference to the ostensible assets of the taxpayer concerned, and that the key performance indicators be reviewed to facilitate such investigations.

12. Chapter 16 : Debt Collection Contracts

In paragraph [28] it is recommended that debt collection contracts be reviewed, and that the use of debt collection services be reviewed to determine whether they add sufficient value to SARS.

13. Chapter 17: Media Statements

In paragraph [12] it is recommended that disciplinary action be considered against any executive for publishing the media statements referred to in this paragraph. It is further recommended that any such executive be deprived of any authority he or she might have to speak on behalf of SARS without the approval of the Commissioner.

14. Chapter 18: SARS and Other State Institutions

In paragraph [3] it is recommended that SARS take steps to restore the cordial relations that formerly existed with other state institutions including the National Prosecuting Authority, the Financial Intelligence Centre, the Auditor-General and the National Treasury, and develop protocols for interaction with the National Treasury.

15. Chapter 19: International Relations

In paragraph [3] it is recommended that steps be taken to restore cordial relations with the OECD.

16. Chapter 20: A Massive Failure of Integrity and Governance – Never Again.

16.1 In paragraph [32] it is stated that a board is not a useful instrument and should not be adopted.

16.2 In paragraph [37] it is recommended that the appropriate role for the Office of the Tax Ombud should remain the addressing of taxpayer rights and that it should not be involved in governance at SARS.

16.3 In paragraph [39] it is recommended that the SARS Act be amended to provide for the appointment of the Commissioner of SARS by the President, after consultation with the Minister of Finance, in accordance with a transparent process, which it is recommended should be along the following lines:

16.3.1 The President should, of his own volition, or after a call for nominations, at his discretion, select one or more suitable candidates for appointment.

16.3.2 The candidate or candidates should

16.3.2.1 be, and be reputed to be, of unblemished integrity;

16.3.2.2 have proven experience of managing a large organization at a high level;

16.3.2.3 not be aligned to any constituency, and if so aligned, should renounce that alliance upon appointment.

- 16.3.3 The candidate or candidates for appointment should submit to a private interview by a panel of four or more members selected by the President. The function of the panel is to evaluate the candidate or candidates against the criteria above and make motivated non-prescriptive recommendations to the President.
 - 16.3.4 Members of the panel should be apolitical and not answerable to any constituency, and should be persons of high standing who are able to inspire confidence across the tax-paying spectrum.
 - 16.3.5 The panel must, upon its evaluation, make motivated non-prescriptive recommendations to the President on the suitability or otherwise for appointment of the candidate or candidates. If the recommendation is against the appointment of a particular candidate, it is the prerogative of the President to reject the recommendation and appoint the candidate nonetheless, or to select an alternative candidate or candidates to repeat the process.
 - 16.3.6 Upon appointment of a candidate, the recommendations of the panel, in whichever direction, should be made public.
- 16.4 In paragraph [40] it is recommended that provision should be made in the SARS Act for the removal of the Commissioner of SARS by the President on specified grounds, through a process that is transparent. In formulating the grounds for removal care should be taken to achieve the correct balance between upholding the autonomy of SARS and the ability to remove an incumbent Commissioner whose continuing incumbency undermines the efficiency and efficacy of SARS and thus the country. Provision should also be made for the suspension of the Commissioner pending proceedings for removal.

- 16.5 In paragraph [41] it is recommended that the SARS Act be amended to require the Commissioner of SARS to appoint an advisory Executive Committee that must include the Deputy Commissioner.
- 16.6 In paragraph [43] it is recommended that the SARS Act be amended to require an annual business plan to be prepared by SARS and approved by the Minister of Finance and that any amendments thereto also require the approval of the Minister.
- 16.7 In paragraph [45] it is recommended that the SARS Act be amended to make provision for the appointment of an Inspector-General of SARS, for renewable periods of five years, with powers comparable to those of a Commission of Inquiry, according to a process broadly similar to the process for the appointment of the Commissioner of SARS. The functions of the Inspector-General should be to investigate matters of governance, on his own account or on complaint, for the purpose of enabling corrective action to be taken. He or she should also be available to be interviewed by persons inside SARS or outside of SARS, being either individuals or representative bodies such as the Institute of Chartered Accountants.
- 16.8 In paragraph [51] it is recommended that provision be made in the SARS Act for the appointment of a Deputy Commissioner of SARS by the President, after consultation with the Minister of Finance, with no management line functions, according to a process that is broadly similar to the process for the appointment of the Commissioner, and for the removal of the Deputy Commissioner by the President on specified grounds, and in accordance with a transparent process.