

INTERIM REPORT

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

MR PRESIDENT

Herewith the first Interim Report of the Commission of Inquiry.

Judge R Nugent
Commissioner
Date: 27 September 2018

EXECUTIVE SUMMARY

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

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

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

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

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

[5] In the circumstances the Commission recommends:

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

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

INTERIM REPORT

INTRODUCTION

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

[2] The Commission is indebted to the acting Commissioner of SARS, Mr Mark Kingon, for affording resources to the Commission that enabled it to commence its inquiries without undue delay, and for the positive, and always responsive, contribution he has made to assisting the Commission. Premises leased by SARS, but separate from its own operational premises, were made available at 2nd Floor Brooklyn Bridge, 570 Fehrsen Street, Pretoria. The Acting Commissioner made available to the Commission two senior legal officials to liaise between the Commission and SARS, a staff member to assist in its administration, and a staff member with knowledge of its information technology systems. Other personnel have assisted the Commission from time to time. A website and dedicated e-mail address were established to facilitate communication, at www.inqcomm.co.za and commission@inqcomm.co.za respectively. Ms Nonhlanhla Mkhwebane was

seconded by the Department of Justice and Constitutional Development to act as Secretary to the Commission. The Commission appointed as its counsel, to present and examine evidence, Adv Carol Steinberg, Adv Lunga Siyo and Adv Frances Hobden. I am indebted to them all for the dedicated assistance they have provided, at times under considerable pressure.

OVERVIEW OF THE COMMISSION'S WORK

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

[4] Submissions and information were invited from the public and from employees of SARS, in confidence if need be. Submissions were invited direct from Business Unity South Africa, Black Management Forum, SA Institute of Chartered Accountants, Confederation of SA Trade Unions, SA Federation of Trade Unions, Black Business Council and the SA Institute of Tax Practitioners. Written and oral submissions were received from the SA Institute of Chartered Accountants, the SA Institute of Tax Practitioners, and the SA Association of Freight Forwarders, and further oral submissions were

presented by the SA Professional Accountants Association, and the Fair Trade Independent Tobacco Association.

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

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

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

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

[9] Those restrictions have limited the scope for opening to public scrutiny some submissions and evidence received by the Commission. We consider the fears expressed by employees to be well-founded, and consider that the inquiry will be considerably compromised if the Commission is deprived of material information only because those in possession of the information are fearful of disclosing it. In those circumstances the Commission will be taking account when making its final report of material furnished in confidence or anonymously, but will be relying upon information received in that way only with circumspection and corroboration or other means of verifying the information. For purposes of this report, however, the Commission has relied only on evidence that has been given in public, or is in the public domain, and to the extent indicated below, our own observations.

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

[11] That having been said, there has been a noticeable shift in the attitude of employees over the past number of weeks, with many more coming forward more willingly, and even enthusiastically at times, to offer evidence. We attribute that to a number of factors. Partly it is an increasing anger amongst employees at the damage they perceive to have been done to SARS and themselves. Partly it is an increasing appreciation that someone is listening to what they have to say. Partly it is an increasing awareness that if they want things to change they must take the risk of speaking out. And partly it is an increasing confidence that the work of the Commission might indeed bring about change. We respectfully request the President to bear this in mind when considering the Commission's recommendations.

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

THE RESPONSE OF SARS LEADERSHIP TO THE COMMISSION

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

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

[15] When conditions at such an institution reach such an ebb that it becomes a matter of serious public concern, warranting the establishment of a Commission of Inquiry, it is to be expected that its leadership will be conscious of that public concern, and will be anxious to engage with the

Commission to right what is wrong. We have encountered quite the opposite in this case.

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

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

[18] On 7 September 2018 Mr Moyane was also advised that the Commission was considering making various findings and recommendations in this interim report, and he was invited to make written

submissions as to why it should not do so by 21 September 2018. A copy of the Commission's letter to that effect is marked 6 in the annexure. The response, two weeks later, on the afternoon of 21 September 2018, is 7 in the annexures, from which it appears, once again, that Mr Moyane has no intention of making submissions, but is intent instead on derailing the Commission. The Commission's response to that letter is marked 8.

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

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

[21] The acting Commissioner, Mr Mark Kingon, has taken admirable steps to correct the more immediate concerns, but SARS can best be served only by long-term certainty and stability, which is not the current position. It is intolerable that the proper functioning of such a vital public institution should be held hostage by the personal interests and ambitions of one man.

[22] We also have some concerns regarding the senior management of SARS, who have seemingly sat back while the reputation of SARS has been

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

THE TERMS OF REFERENCE

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

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

THE CURRENT STATE OF SARS

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

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

[27] One initiative to that end was the introduction of information technology – a programme referred to as modernisation – to replace the paper-based operations of SARS, thereby accelerating the processing of tax collection, freeing human resources for more productive tasks, and enabling SARS to accumulate data for analysis and understanding of taxpayer behaviour and the tax gap. Another was the creation of the Large Business Centre, designed to provide ‘one stop’ service to large corporate taxpayers, from which about 30% of revenue is collected. SARS also had effective measures in place to counter the illicit trades that are capable of depriving the State of billions.

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

[29] No doubt that was not universally the case. We have heard from some, though only in written submissions, most often submitted anonymously, that management was dictatorial. Some have said that transformation was neglected. We have heard that power within the organisation was excessively concentrated. Clearly there were also shortcomings in the operations. While there is undoubtedly some truth in that, the overwhelming thread that runs through the accounts presented to us, is the vibrant and dedicated environment I have described.

[30] That is not the SARS of today. Today the air at SARS reeks of intrigue, fear, distrust and suspicion. We have heard of it in evidence, and we have encountered it ourselves. One witness recounted how, early in his tenure, Mr Moyane had a plethora of CCTV cameras installed, such that employees

feel themselves under constant surveillance, so much so that some employees have taken to covering the camera lenses on their computers with tape, lest they be watched while they go about their work, fearful of any perceived misdemeanour that might result in disciplinary proceedings. The trajectory of modernisation, that had been in the making for a decade, was summarily stopped when Mr Moyane arrived, and now only adjustments and adaptations are made to the systems from time to time, while the systems themselves degenerate as technology advances. The operating model has been restructured such that fragmentation of functions inhibits co-ordinated action over various disciplines to the benefit of delinquent taxpayers. The Large Business Centre as it had existed has been eviscerated to the detriment of revenue collection. The restructuring of the organisation displaced some 200 managerial employees from their jobs, many of whom ended up in positions that had no content or even job description, and in exasperation many skilled professionals have left. Others remain in supernumerary posts with their skills going to waste. Measures to counter criminality have been rendered ineffective and those who trade illicitly in commodities like tobacco operate with little constraint. Relations between the Commissioner of SARS and other state institutions – the Treasury, the Auditor-General, the Davis Tax Committee, the Financial Intelligence Centre – are icy, if there is any relationship at all, and SARS is isolated from its former high status amongst international bodies. Meanwhile, the reputation of SARS continues to be tarnished by reports in the media, many of which are true, to which the only response by Mr Moyane has been to attempt to intimidate the media by spurious litigation.

[31] There is no doubt that all this has compromised revenue collection and tax compliance and that is set to continue if things go on as they are. We do

not think it will be possible to attribute the decline in revenue collection with any accuracy, but the analysts we have heard all agree that a material part is to be laid at the door of ineffectiveness at SARS, and the ongoing loss is set to continue in the absence of decisive intervention.

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

The Change in Senior Management

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

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

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

[36] I have not yet found why the creation and existence of the unit was said to have been unlawful, which is how it was consistently and uncritically depicted. I find no reason why the establishment and existence of the unit was indeed unlawful, and I am supported in that by an opinion given to Mr Moyane by leading senior counsel in late 2015. As far as I am aware that opinion has never been publicly disclosed. It might be that some of the activities of one or more of its six members was unlawful but that is something else. If that was indeed the case, it is nonetheless incredible that unlawful acts of one or more of six men led to millions of rands being spent, and the holding of repeated inquiries, with continuing damage to the reputation of SARS.

[37] What sparked this off was a report in the Sunday Times on 12 October 2014, some two weeks after Mr Moyane took office on 27 September 2014. It was reported that an unlawful 'rogue unit' existed within SARS, whose members had planted listening devices in the home of former President

Zuma. That report, and others that followed in similar vein, was to do immeasurable damage to SARS, and to the lives of many people.

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

[39] Once having read the report in the Sunday Times on 12 October 2014 Mr Moyane called together the members of EXCO that afternoon and demanded to know what they knew about the allegations, and all the members disavowed any knowledge. On Monday the members of EXCO were summoned once again, on this occasion with their subordinates, and were asked once again what they knew, and the members of EXCO once again disavowed any knowledge, whereupon Mr Moyane promptly announced he had no confidence in the members of EXCO and that it was disbanded.

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

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

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

[43] Meanwhile, in October 2014, Mr Moyane ordered the disbandment of the High Risk Investigation Unit, and the termination of surveillance of those who were under investigation by the unit. No new capacity was created to continue its functions. It can be inferred from analytical evidence we have heard that there is at present a material and ongoing loss of revenue from tobacco related taxes for want of investigation and vastly diminished regulation of the illicit economy.

[44] December 2014 was a busy month for Mr Moyane. Following on a decision to do so in October 2014, a consulting firm called KPMG was appointed by Mr Moyane to investigate the 'rogue unit' allegations, particularly so far as they might implicate Mr Pillay, Mr Richer and two others, at an ultimate cost to the taxpayer of about R24 million (the money

has since been returned to SARS). Computers were seized and a mountain of correspondence and other documents were trawled through until a preliminary report was prepared in about June 2015 making damning allegations against Mr Pillay in particular, consequent upon which criminal proceedings were initiated against him and others by Mr Moyane. That was to be followed by criminal charges being brought against Mr Pillay, Mr Magashula and Mr Gordhan, in circumstances still unclear to me, which were later withdrawn.

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

[46] It has now emerged from an affidavit deposed to by the local managing partner of Bain that it had been advising Mr Moyane for a considerable time before he was appointed, producing for him a number of reports on transforming and taking charge of SARS. Why that occurred remains under inquiry and will be reported upon in the Commission's final report. Serious questions have also arisen concerning the propriety of the award of that contract, which also remains under inquiry. For the present it is sufficient to say that the arrival of Bain brought its own turmoil.

[47] Following upon a short and perfunctory 'diagnostic' investigation by Bain & Co, with little or no consultation with operational managers, nor communication to employees of what was going on, a new operating model

for SARS was devised and implemented. I return to the consequences of that presently.

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

[49] By the middle of 2017 nothing was left of the EXCO that had existed when Mr Moyane took office. Mr Makwakwa was Chief Officer: Business and Individual Tax. Mr Matsobane Matlwa was Chief Officer: Finance. Mr Teboho Mokoena was Chief Officer: Human Capital and Development. Mr Jed Michaletos was Chief Officer: Customs and Excise. Mr Hlengani Mathebula was Chief Officer: Governance, International Relations, Strategy and Communications. Ms Refiloe Mokoena was Chief Officer: Legal Counsel. Ms Mmamathe Makhekhe-Mokhuane was Chief Officer: Digital Information Service & Technology. Ms Mogola Makola was Chief Officer: Enforcement.

[50] All the appointees, other than Mr Makwakwa, and Mr Matlwa, who was appointed in December 2014 but had worked for SARS before, emanated

from outside SARS, and none but them had had experience of tax collection. The institutional memory that had been built up in SARS was almost entirely eradicated in EXCO.

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

Replacement of the Operating Model

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

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

that is what occurred in many cases. Others with skill and experience remain at SARS with little to do.

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

[55] No responsible leader of a major and complex organisation would have acted as Mr Moyane did, with lasting impact on the current state of SARS. With no experience of SARS or of revenue collection, his first decisive step was to denounce and humiliate its senior management and deprive it of its role. Having done so he turned a world-class organisation upside down, leaving SARS as it is today: wracked with intrigue, suspicion, and distrust, and fear of senior management; information technology that is in decay; a fragmented structure that inhibits collaboration amongst functions to the detriment of revenue collection; space for the illicit trade to flourish; loss of long-serving skills; skilled and experienced personnel in supernumerary positions doing little if anything at all; and revenue collection compromised.

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

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

THE RELATIONSHIP WITH OTHER INSTITUTIONS

[57] The effective functioning of the State calls for close collaboration between SARS and other State institutions. It is to be expected that the Commissioner of SARS will liaise closely with the Minister of Finance, but while Mr Gordhan held that position there was active defiance. When Mr Gordhan became concerned at the steps being taken to change the operating model he asked for it to be suspended, but that was ignored. When he disapproved the extent of bonuses to be paid, Mr Moyane again defied him, bringing him into conflict with the Auditor General. According to Treasury officials, the relationship between Treasury and Mr Moyane has all but broken down.

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

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

[60] It is premature to say why all this has occurred, but this much is clear: SARS has been brought to its present state through what is at least reckless mismanagement by Mr Moyane, and it is imperative that SARS be restored to a decisive course of recovery under sound management.

FUTURE GOVERNANCE OF SARS

[61] What has occurred at SARS during the tenure of Mr Moyane demonstrates that material legislative changes need to be made to enhance the formal governance of SARS so as to avoid it recurring. Having heard

evidence on that issue we set out briefly our preliminary views, which will be expanded upon and formulated in the Commission's final report.

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

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

- the optimum model for SARS including the responsibilities of its head (i.e. the Commissioner) and reporting obligations;
- the appointment and removal of the Commissioner;
- detect and prevent internal fraud, as well as internal and audit functions;
- oversight by an independent body that oversees their results and a budgetary review process that monitors their spending;

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

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

[65] The Davis Committee also recommended the creation of a Board that would supervise the operation of SARS with the clear objective of promoting the integrity of its conduct as well as to ensure that it implements systems to collect revenue as fairly and efficiently as possible. In this regard paragraph 40 of the Davis Committee’s aforesaid Report reads as follows

‘The Committee strongly recommends the creation of a Board which would supervise the operation of SARS with the clear objective of promoting the integrity of its conduct as well as to ensure that it implement systems to collect revenue as fairly and efficiently as possible. The Board should be constituted by the Minister of Finance and, save for the Commissioner, or his/her delegee, the Deputy Commissioner and the Director General of Finance or his/her delegee, it should be comprised of members who are attached neither to Treasury nor SARS and who may be appointed by the Minister with due regard to representivity, expertise in finance and taxation and the general economy. It could be chaired by a retired judge. The Board could be provided with sufficiently strong powers

of investigation so that it may be empowered to make meaningful recommendations to the Minister with regard to the question of accountability of SARS and to its compliance with its statutory obligations and own strategic vision and mandate. As recommended, the Board could be mandated to provide the Minister with a shortlist of candidates for the office of Commissioner, from whom the Minister is obliged to choose.'

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

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

[68] We are, in general, in accord with those sentiments. The process for appointment of a Commissioner of SARS warrants revisiting, and we will report on that in due course. Once appointed, there ought to be checks on the exercise of his or her powers, some degree of accountability to the Minister of Finance, and provision for co-operation between SARS and other

State Institutions. There ought also to be a mechanism for intervention when things are seen to be going wrong. That ought not to lie within the province of the Tax Ombud, as has been mooted, whose proper province is taxpayer affairs, and not administration within SARS. We will address those principles in our final report.

CONCLUSION AND RECOMMENDATIONS

[69] It is imperative that SARS be urgently restored to sound management to arrest ongoing loss of revenue and eroding tax compliance and to set SARS on a firm course of recovery. The acting Commissioner has taken admirable steps towards correcting the most immediate concerns but long-term and decisive decision making is feasible only in conditions of certainty and stability. Moreover, daily management at SARS remains in a state of undesirable uncertainty for so long as future management is unclear. A new Commissioner is needed without delay by SARS, which is not possible while Mr Moyane remains in office, and that state of affairs needs now to be brought to an end. That is the unanimous view of the Commission and those who have been appointed to assist the Commission.

[70] The replacement of Mr Moyane will by no means by itself restore SARS but it is a non-negotiable pre-requisite for the process of recovery to begin, which is why we have recommended it at this early time. We have other serious concerns that will be addressed in the Commission's final report but

without the replacement of Mr Moyane any expectation of recovery at SARS is futile.

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

[72] For those reasons it is recommended:

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

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

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