

MINISTER OF FINANCE

REPORT ON:

FACT FINDING INQUIRY INTO THE ALLEGED IMPROPER CONDUCT OF THE
COMMISSIONER OF THE

SOUTH AFRICAN REVENUE SERVICES (SARS) MR. OUPA MAGASHULA:
REQUESTED BY MINISTER OF FINANCE

By

**RETIRED JUDGE ZAK YACOOB and Mr MUZI SIKHAKHANE, Advocate of the High
Court of South Africa**

1. INTRODUCTION

1.1. On 2 April 2013 the Minister of Finance of the Republic of South Africa, Mr. Pravin Gordhan appointed us as an internal fact finding committee into allegations of improper conduct of the SARS Commissioner Mr. Oupa Magashula.

1.2. We must

1.2.1. investigate:

1.2.2. whether there was any breach of SARS processes or good governance;

1.2.2.2. the nature of any possible indiscretion by the Commissioner;

1.2.2.3. The alleged friendship between Mr. Marimuthu and the SARS Commissioner as well as the alleged influence Mr. Marimuthu may have had over the Commissioner;

1.2.3. and advise on:

1.2.3.1. appropriate remedies if breaches have occurred; and

1.2.3.2. any other related matter.

1.3. These issues were investigated over several weeks, seven days of which were devoted to interviews with a number of people relevant to the issues.

2. BACKGROUND

2.1. On 24 March 2013 the City Press published an article ("the article") under the headline **"Caught ON TAPE"**. There was also a by-line: "boss and drug dealer". The article read in relevant part:

"SA Revenue Services (Sars) boss Oupa Magashula is at the centre of a jobs-for-pals scandal involving a convicted drug dealer who is allegedly a police informant.

In a clandestine recording laced with sexual innuendo, a copy of which the City Press has in its possession, Magashula and Panganathan "Timmy" Marimuthu offer a 28-year old woman from Marimuthu' s church a R700 000-a-year Sars post.

Sars officials this week confirmed the authenticity of the recording, but claim their boss' hands are clean and Marimuthu set him up.

Marimuthu, a convicted Mandrax dealer and businessman, is currently facing an intense tax investigation into his affairs.

The officials, who were delegated to represent Magashula, said the tape had been used by Marimuthu in a smear and blackmail campaign to force Sars to back off.

City Press established through two independent sources that the compromising recording was made by Crime Intelligence operatives. The recording, which was made in 2010 features the voices of Magashula, Marimuthu and a young woman known only as "Nosipho".

On it, Magashula is heard discussing a R700 000-a-year job with Nosipho,

as he and Marimuthu trade jokes and banter. Marimuthu identified Magashula on the tape as a "mate of mine", while the Sars commissioner calls him "my brother Timmy".

Sars is previously on record denying that Marimuthu held any sway over its boss after he last year reportedly claimed to have Magashula in his pocket..."

2.2. The article also included a reasonable transcript of the recording, a copy of which is attached marked as Annexure A. We were furnished with the recording itself during the course of our investigation. There are only minor inconsistencies between the recording and the transcript.

2.3. This article must be understood in the context that another weekly newspaper, the Sunday Times, had previously reported that SARS had addressed warning letters to Marimuthu. On 29 April 2012 the Sunday Times published an article ("the Sunday Times article") the essence of which is captured in this quote from it:

"Secret Agent" Timmie Marimuthu is facing a probe by the SA Revenue Service despite allegedly boasting privately that he had SARS boss Oupa Magashula "in his pocket"...

SARS sent a letter to Marimuthu on September 29 last year warning him to stop lying about his influence at the agency.

In the letter, deputy commissioner Ivan Pillay said he heard that Marimuthu was boasting of his "influence over" the appointment of SARS officials. "We advise that it is in your best interests, and those of SARS, that persons close to you desist from making such unfounded statements," said Pillay.

2.4. Both the article and the Sunday Times article published SARS's response which was made through SARS's spokesperson, Mr. Adrian Lackay. SARS has always denied the claim that Mr. Marimuthu had influence over the Commissioner but admitted that the recorded conversation did take place.

2.5. The allegations published in the article took root in the media generally and were widely disseminated. SARS then issued its own statement on the matter.

2.6. The Minister issued his own statement in response to the article which in relevant part reads:

STATEMENT BY MINISTER OF FINANCE

“The South African Revenue (SARS) is a crucial fiscal institution that is highly respected within and outside South Africa.

Certain allegations have been made in the media today (Sunday, 24 March 2013) about possible impropriety involving the Commissioner of SARS. I have an initial report which gives an account of interaction between the SARS Commissioner and certain individuals mentioned in the media reports. From the facts available it is not evident that there has been a fundamental breach of SARS processes.

It must be emphasized that the young Chartered Accountant (CA) did not supply SARS with her CV nor was she ever employed by SARS.

However, to ensure transparency and that SARS' integrity is protected, I have decided to institute a thorough investigation of the matter. After consultations with the Minister of Justice, I will appoint a retired judge to establish whether there was any breach of SARS processes, good governance, and the nature of any possible indiscretion and to advise on

appropriate remedies where breaches may have occurred.

..."

2.7. Our appointment followed in terms of letters dated 2 April 2013 which describe our mandate.

3. PROCEDURE

3.1. We were given the discretion to adopt rules and procedures designed to achieve a speedy but in-depth investigation or fact-finding process.

3.2. The approach taken was this:

3.2.1. We analysed the article and relevant media reports;

3.2.2. We then evaluated the transcript of the conversation, compared it with the recording for accuracy and listened to the recording for tone;

3.2.3. We studied the documentation in the possession of SARS that could lawfully be made available; and

3.2.4. Finally, we interviewed witnesses in two phases.

3.2.4.1. The SARS officials interviewed in the first phase were the Commissioner, the Deputy Commissioner, Ms. Coetzer and Mr. Sebothoma. We also interviewed the Deputy Minister for Finance, Mr. Nhlanhla Nene, as well as the chartered accountant with whom Mr. Marimuthu and the Commissioner talked in the recorded conversation. She was known only as Nosipho when the investigation started and is now

known to be Nosipho Mba.

3.2.4.2. The second phase became necessary because of the evidence of the Deputy Minister and certain information provided by Ms. Mba. We interviewed the Commissioner and the Deputy Commissioner several more times, certain officials at SARS, as well as the person who, as will be seen later, acquainted the Deputy Minister with the recording.

3.3. We had no powers of compulsion.

3.3.1. An important consequence of this was that we could not insist that anyone testify before us. It was necessary for us therefore to take an approach that made it possible for people to provide us with information and evidence. Every witness was told that the evidence would not be published or used against them unless they consented. The same approach was taken in respect of the Commissioner with a slight difference. He was told that the evidence he gave would not be made available to any entity that was charged with the responsibility of proceeding against him formally for the purpose of determining whether he should be found guilty in any disciplinary proceedings that might be brought against him. He could of course consent to the release of the evidence. This has implications for the way in which any further proceedings we recommend should be managed.

3.3.2. A second consequence of the fact that we had no powers of compulsion was that invitations were extended to specific officials. We also extended an invitation to Mr. Marimuthu to assist the fact-finding team if he so wished but he in effect, declined. Copies of a letter addressed to him through the State Attorney and the email as communicated to us by the State Attorney's Office informing us of his response are attached marked Annexure **B** and **C** respectively.

3.4. While we were busy seeking assistance from KPMG to trace Ms. Mba, an article

appeared in the City Press of 14 April 2013 in which Ms. Mba was interviewed. We then addressed a letter to her through the State Attorney, a copy of which is attached marked annexure **D**, requesting an interview. She acceded.

3.5. Since the allegations were directed at the Commissioner, the enquiry focused on interviews with him. It was deemed appropriate to first invite the Commissioner to talk to us.

3.6. Before the interview, it was brought to our attention that the Commissioner preferred to have the Deputy Commissioner present.

3.7. It was considered important that the Commissioner be given a fair opportunity to comment upon and respond to accusations that had been levelled against him. We are satisfied that this opportunity was afforded to him. We must emphasize that we thought it inappropriate to cross-examine the Commissioner. Inconsistencies as they emerged were carefully put to him, the consequences of inconsistencies and new discoveries carefully explained and his response used as part of the basis for the evaluation of what he said.

3.8. We had no access to crime intelligence and could not establish who recorded the conversation.

3.9. The issues canvassed in this report are matters of substantial public importance to South African democracy and the role of SARS as well as the integrity of its Commissioner.

4. SARS's STATUTORY MANDATE

4.1. The starting point in our view is the Constitution and the principles set out in

section 195. It is unnecessary to repeat these here.

4.2. SARS has a statutory mandate which flows primarily from the South African Revenue Services Act of 1997 "the Act". The Act places particular obligations upon the SARS and the Commissioner.

The Code of Conduct

4.3. We requested a copy of the code of conduct from the Deputy Commissioner in order to make a proper assessment of the conduct of the Commissioner and to ensure that we offered appropriate advice regarding future conduct of SARS's officials facing circumstances in which the Commissioner found himself.

4.4. SARS's Code of Conduct was developed in 1993 and was revised in its 2004 editorial policies to incorporate new developments and changes in the law. In its present form, it affirms a commitment to the principle of good governance. Relevant parts of the Code are set out below. We asked the Commissioner and Deputy Commissioner to present to us a revised Code of Conduct that SARS considered appropriate today. They submitted a revised Code of Conduct, with which we agreed. A copy of the revised Code of Conduct is attached as Annexure E.

4.4.1. Section 2.1 of the Code of Conduct as proposed by SARS provides that:

"Good governance is essential for the effective administration of a tax system. The management of SARS is acutely conscious of and seeks to implement good governance principles. Good governance means promoting values for the whole of SARS and demonstrating the values of good governance through behaviour."

4.4.2. Section 2.2 of the Code of Conduct (which existed before the revision now proposed by SARS) embraces the following values:

4.4.2.1. mutual trust and respect;

4.4.2.2. equity and fairness;

4.4.2.3. integrity and honesty;

4.4.2.4. transparency and openness; and

4.4.2.5. courtesy and commitment.

4.4.3. Section 10 of the Code of Conduct before revision provides in relevant part that:

"A SARS official, whether acting in an official or non-official capacity, must:

10.2 not behave in a manner that may compromise the official or cause reputational harm to SARS."

4.4.4. Section 4 of the Code of Conduct deals with ethical standards for SARS officials and stresses that:

"SARS officials must endeavour to promote and maintain a high standard of professionalism and ethical behaviour."

4.5. We were told that the revised code of conduct would be adopted once it has been discussed within SARS. We have suggested a further revision involving an addition to section 4 of this sentence in particular:

"ETHICAL STANDARDS FOR SARS OFFICIALS": SARS officials must not make any statement without authority and outside the formal processes of SARS that expressly or by implication creates the impression that benefits

are being conferred or may be conferred without required SARS processes being followed."

4.6. We attach a copy marked as Annexure **F** with the revisions proposed by SARS officials, including our suggestions.

4.7. We also attach as Annexure **G** a separate Practical Guide developed to apply specifically to the Commissioner of SARS and other senior management.

5. THE EVIDENCE CONSIDERED

First Phase

The first meeting with the Commissioner

5.1. On 3 April 2013 we interviewed the Commissioner in the presence of the Deputy Commissioner.

5.2. We first sought to find out if the Commissioner accepted the authenticity of the transcript. We also sought to canvas with the Commissioner:

5.2.1. the purpose of the meeting during which he was recorded;

5.2.2. the identity of the person(s) he was meeting on the day;

5.2.3. The Commissioner's relationship (if any) with Mr. Marimuthu;

5.2.4. His understanding of the relationship between Nosipho and Mr. Marimuthu;

- 5.2.5. Why he said what he said in the recorded conversation;
- 5.2.6. Whether he was indeed, as a matter of certainty, offering Ms. Mba a job in the sense of undertaking to employ her, without more, as soon as she made herself available;
- 5.2.7. Whether he had received any correspondence from or communicated in any way with Ms. Mba after the recorded conversation; and
- 5.2.8. Whether he has learned any lesson from this event.
- 5.3. The Commissioner never took issue with the authenticity of the recording. He confirmed that he did have the conversation as recorded.
- 5.4. Commissioner Magashula was appointed Commissioner in August 2009 having acted in that position since May the same year.
- 5.5. The Commissioner told us that on the day the conversation was recorded he was on holiday in Durban towards the end of July or early August 2010. He had arranged to meet a senior government colleague while on holiday.
- 5.6. The Commissioner said that although he knew of Mr. Marimuthu, he had never had a direct encounter with him.
- 5.7. The Commissioner's explanation concerning the recorded conversation is now set out.
- 5.7.1. While he was with the senior government official, Mr. Marimuthu joined them. The Commissioner was surprised because he had not been alerted

that Mr. Marimuthu would join them at the restaurant.

- 5.7.2. Hardly ten minutes after his arrival Mr. Marimuthu told the Commissioner that he knew a young African woman who was a Chartered Accountant looking for a job.
- 5.7.3. The Commissioner was naturally excited at the possibility of recruiting into SARS a female African Chartered Accountant and showed interest.
- 5.7.4. Without any forewarning, Mr. Marimuthu telephoned the lady he was talking about and, after a brief discussion with her, handed his cellular phone to the Commissioner.
- 5.7.5. The Commissioner had the recorded conversation with the lady who introduced herself only as Nosipho. When his conversation with her ended, Mr. Marimuthu continued to talk to her.
- 5.7.6. The Commissioner expressed regret at the casual nature of the conversation and indicated that with the benefit of hindsight he believed that he should have been more cautious and circumspect.
- 5.7.7. The Commissioner also indicated that although he had heard of Mr. Marimuthu, he had had no prior relationship with him.
- 5.7.8. The Commissioner was excited to find an African female Chartered Accountant, and his "offer" to Ms. Mba was subject to the usual employment processes of SARS. It is for this reason that he requested Ms. Mba to send her CV to him so that it could be processed like any other application and in accordance with SARS's Human Resource policy.
- 5.7.9. The Commissioner assured us that SARS neither received Ms. Mba's CV

nor engaged in further communication with her.

5.7.10. When it was put to the Commissioner that at his level the nature of the discussion was unfortunate, he expressed regret and stated that the presence of a senior government colleague had resulted in him dropping his guard. He apologised for the incident and undertook to put processes in place to ensure that a similar incident does not recur.

5.7.11. He unequivocally acknowledged the mistake and that he had naively engaged in the conversation without knowledge that it would be recorded or that it would cause some embarrassment to him or SARS. He also acknowledged that the conversation was over-familiar and by implication unprofessional.

First meeting with the Deputy Commissioner

5.8. The Deputy Commissioner recounted the events in his knowledge as follows, in the presence of the Commissioner:

5.8.1. He started hearing about claims being made by Mr. Marimuthu that Mr. Marimuthu knew the Commissioner and by reason of this fact, could assist people with tax problems.

5.8.2. Mr. Marimuthu was claiming that he had secured a job for a certain Ms. Manoko, a claim the Deputy Commissioner says was simply untrue as this lady never worked for SARS;

5.8.3. The Deputy Commissioner knew of Mr. Marimuthu and his reputation, and that Mr. Marimuthu had been a policeman during apartheid.

5.8.4. During 2011 while SARS was auditing Mr. Sydney Pandaram, he claimed

that SARS was targeting him at the behest of Mr. Marimuthu. Mr. Marimuthu and Mr. Pandaram had apparently been business partners and had since fallen apart.

5.8.5. During the same year the recording fell into the hands of a SARS's tax investigator. It was passed on to him by someone who had claimed that he had something that could embarrass SARS.

5.8.6. The SARS's tax investigator gave the recording to the Deputy Commissioner, who took it to the Commissioner. The Commissioner informed the Deputy Commissioner that the conversation had taken place.

5.8.7. Sometime during 2012 the Sunday Times contacted SARS claiming for the first time that there was some recording which supported the claim that Mr. Marimuthu had a hold on the Commissioner. SARS refuted the claim.

5.8.8. The Sunday Times article eventually dealt with this matter. However, this article did not present SARS or the Commissioner negatively.

5.8.9. During August 2012 the Deputy Minister called the Deputy Commissioner claiming that he had been approached by a person who claimed that he had embarrassing information about SARS.

5.8.10. SARS was at this time conducting an assessment on Mr. Marimuthu's tax affairs.

5.8.11. The Deputy Commissioner stated that the systems of recruitment at SARS are stringent and no one person could ensure that a person is simply employed without going through these processes. Accordingly, he was of the view that while the conversation was regrettable, it could not possibly constitute a

job offer as reported in the media.

Trix Coetzer

5.9. Ms Trix Coetzer was interviewed simply to assist the fact finding team with some information on how one qualifies as a Chartered Accountant. For present purposes, her evidence need not concern us.

Mr Maropeng Sebothoma

5.10. Mr Sebothoma works in the Human Resources, Planning, HR Systems and strategy formulation within SARS. He was interviewed to confirm whether the recruitment systems at SARS could be manipulated by any official in order to ensure employment of an individual of their choice.

5.11. This became important because as we have just said, the Commissioner and the Deputy Commissioner had emphatically stated that the processes of employment at SARS are firm and consistent and cannot easily be manipulated by any one official to ensure employment of an individual without due process.

5.12. Mr Sebothoma confirmed this.

Ms. Mba

5.13. On 30 April 2013 we interviewed Ms. Mba in Durban. As we said earlier we traced her after the City Press article of 14 April 2013 in which she had commented about the recorded conversation.

5.14. Ms. Mba is the Chief Financial Officer of ILEMBE District Municipality, north of

Durban, in the province of KwaZulu-Natal.

5.15. She confirmed that she was previously employed by KPMG as stated in the recorded conversation. She left KPMG when offered a better job with the municipality.

5.16. We started the interview by playing the recording to her. She confirmed that it was indeed the conversation she had had with both Mr. Marimuthu and the Commissioner. She also confirmed the voice on the recording as hers.

5.17. The following summary of what she said about the circumstances of the recording will suffice.

5.17.1. She knew Mr. Marimuthu as they both belonged to the same church in Durban. Mr. Marimuthu joined the church after her.

5.17.2. She had spoken to Mr. Marimuthu before the date of the recorded conversation but did not regard their relationship as close.

5.18. She did send her CV to the Commissioner and was later called by a lady from SARS. An interview was indeed arranged, but she later changed her mind.

5.19. She called the lady at SARS who had arranged the interview and advised her that she would not attend.

5.20. We were perturbed by her allegation that she had indeed sent her CV, to the Commissioner at the email address that had been given to her and that she had actually been offered an interview by someone from SARS. We accordingly urged her to send us copies of the email messages if she could find them. It must be remembered that the

Commissioner had denied without equivocation that he had ever received any correspondence from Ms. Mba.

6. SECOND PHASE OF INTERVIEWS

6.1. It became apparent to us after the interview with Ms. Mba that the Commissioner had not given us all the correct facts, if Ms. Mba was right that she had made her CV available to him by email. Accordingly, we had to tell the Commissioner about Ms. Mba's statement that she had sent her CV to him and had in fact been called to an interview.

6.2. We accordingly interviewed the Commissioner again on 3 May 2013. At the time we scheduled the interview, no proof had yet arrived that Ms. Mba was indeed telling the truth. We did not at that stage expect any hard information on this aspect because we believed that the Commissioner had been completely honest.

6.3. However, two relevant email messages had been sent by Ms. Mba. We looked at them while interviewing the Commissioner and asked him to check again in the light of their contents. The interview was then brought to an end before our analysis of the emails had been completed. We completed the analysis shortly afterwards.

6.4. The email messages are attached marked annexures **H** and **I**. The one is dated 14 May 2011 in which Ms. Mba pointed out that she had forgotten to send her contact details. The contents suggested that Ms. Mba had just forwarded her CV to the Commissioner that very day, that she had omitted to send her contact details and that she was making good her error. In that email, she referred to the Commissioner as “the Commissioner”.

6.5. The second email dated 23 May 2011 which curiously addressed the

Commissioner as “Mr. Gashu”, said that someone had telephoned her from SARS about an interview, enquired whether this telephone call was the result of the "offer" he had made to her, and asked whether a job was not available for her in Durban.

6.6. A telephone call to Ms. Mba revealed a fact that later turned out to be incontrovertible: the email with the CV which had not yet been unearthed, and the email containing the contact details had both been sent on the very day on which the recorded conversation had been held. This meant that the recorded conversation had taken place on 14 May 2011, not during July-August 2010. The interview had taken place ten months after the date we had been given by the Commissioner. What is more, the Commissioner had initially linked the date of the conversation to the end of the Soccer World Cup and to the Durban July. This link was now untenable.

6.7. We had therefore to speak to the Commissioner again on the same day. The Commissioner was surprised that emails had been sent to him and sought to think about it further. Upon seeing that the emails showed that the conversation had taken place in May 2011 and not 2010 as he had earlier told us, the Commissioner admitted that it may well be that he had been mistaken about the year during which the conversation actually took place. The Commissioner was then asked to reconsider the new information and revert to us after enquiring further in the light of this new information.

6.8. On the same day we held another interview with the Deputy Commissioner to put the same issues to him. The Deputy Commissioner told us that he had relied on the statements given to him by the Commissioner and he had not at the time questioned the veracity of what the Commissioner had told him. After all, as he put it, the Commissioner was his boss. We also gave Deputy Commissioner another opportunity to reconsider.

6.9. Soon after these two interviews we received unsolicited affidavits from the Deputy Commissioner, the Commissioner and Ms. Mathabo Sukati. We attach copies of

these affidavits to this report as Annexures **J**, **K** and **L** respectively.

6.10. The gist of the new evidence was that Ms. Mba's CV had not only been received by the Commissioner, but had been forwarded by him to a person in Internal Audit for that department to consider whether she could be appointed. A contemporaneous note, the correctness of which could not be doubted, showed that Ms. Mba had indicated that she wanted a job in Durban, and that she was accordingly not interviewed. The Commissioner and the Deputy Commissioner both apologised for the fact that incorrect information had been given to us and assured us that this was not deliberate, but the result of error.

6.11. An important consequence of this new information was that the Commissioner would have forgotten three email messages, and the fact that he had forwarded them for further attention.

6.12. We were also concerned that the fact of the receipt of the CV and the developments thereafter were not found out earlier bearing in mind that all the information was within the SARS email system and other records. Other officials we interviewed from Recruitment and other sections indicated to us that the search for Ms. Mba's CV had been directed at the wrong department. Had the search been directed at the Recruitment section of SARS Ms. Mba's CV would have been found earlier. The enquiry had been aimed at finding out whether Ms. Mba had been employed and not whether she had supplied her CV to the Commissioner and whether she had been considered for employment.

6.13. We were concerned that the Minister had been informed, undoubtedly on account of assurances from the Commissioner that the Commissioner had received nothing from Ms Mba without a search having been made in the right place. It was in consequence of this misinformation that the Minister had made an inaccurate statement to the public.

6.14. We saw the Commissioner again on 23 May 2013 to raise these new matters.

6.14.1. It will be remembered that the Commissioner had earlier said that the recorded conversation had taken place during August 2010 and that it has now been conclusively established that the conversation had in fact occurred ten months later on 14 May 2011. This change in the date of the recorded conversation made it necessary to traverse again the question of how well the Commissioner knew Mr. Marimuthu. The Commissioner now said that he had met Mr. Marimuthu more than the times he originally told us about. The Commissioner admitted to have encountered Mr. Marimuthu at least four times before the recorded conversation, although he stated that none these encounters was a meeting between the two of them. He said he first met Mr. Marimuthu at the house of Vivian Reddy in January of 2010, on the day of the 2010 Durban July (it will be recalled that this was the time around which the Commissioner had initially told us the recorded conversation had occurred), on the Sunday after the Durban July (he did not volunteer and we did not ask what this encounter was about), and then on an aeroplane.

6.14.2. Another matter that had to be raised with the Commissioner was how he could have forgotten having received the 3 email messages from Ms. Mba, and the fact that he had forwarded them to his professional assistant with instructions that the CV should be passed on to an official in Internal Audit. His only explanation was that it was a long time ago and that he had received and passed on many CV's for consideration by divisions of SARS as a matter of course. It was pointed out to him that this could not be a relevant explanation because, as he had told us, this CV had been received on his private email on which there is not much traffic, and because it had been received shortly after he himself had solicited it. Asked to explain why he had given her his private email address which he said he reserved only for personal communications and top level communication with the Minister, he said that he gave that address so that Ms. Mba would remember the address without writing it down—he was apparently

uneager to wait for her to fetch pen and paper.

6.14.3. We also asked the Commissioner whether he could explain why it was that Ms. Mba had referred to him as Mr. Gashu on the email of 23 May 2011 when she had referred to him as the Commissioner in the email messages that had been sent on 14 May 2011. He said that he was not known as Gashu, that Gashu was not an intimate form of address and that he found the use of it in relation to himself insulting. We pointed out to him that this was a further reason that made it difficult to understand how he had altogether forgotten about the communications Ms. Mba had sent to him. On the issue of why she had called him Mr. Gashu he finally explained that she may well have called him Mr. Gashu because she had forgotten his name.

6.14.4. At the end of this interview, we requested the Commissioner to ensure that an expert checks his emails during the relevant period and come back to us if any more emails should surface.

6.15. Two occurrences after we had spoken to the Commissioner for the second time on 3 May 2013 made it necessary to see the Commissioner again on 28 May 2013.

6.15.1. The first was that the Commissioner caused a further search of his email messages to be conducted. It revealed two more emails from Ms. Mba. These emails had not been revealed to us and had not been part of the emails the Commissioner had passed to his personal assistant. The first of these is dated 16 May 2011 and the second 20 May 2011. The former asks for more information about the position Ms. Mba might get so that she could make "an informed decision", while the latter is the first enquiry about the availability of a position in Durban. We attach copies of these emails as annexures **M** and **N** respectively. There were now five emails.

6.15.1.1. The first, dated 14 May 2011, the very day of the recorded

conversation, which referred to the Commissioner as “Mr. Commissioner” and sent “attached the CV”;6.15.1.2. The second, sent later on the same day, providing contact information and again addressing the Commissioner as “Mr. Commissioner”;

6.15.1.3. The third, dispatched on 16 May 2011, two days after the recorded conversation had happened, asked for more information so that Ms. Mba could make an informed choice, and referred to the Commissioner as “Mr. Magashula”;

6.15.1.4. Email message number four, dated 20 May 2011 enquired about possibilities of employment in Durban and referred to the Commissioner as “Mr. Gashu”.

6.15.1.5. The final one, of 23 May 2011 again called the Commissioner “Mr. Gashu” and asked about possibilities of employment in Durban for the second time.

6.16. Two difficulties became apparent:

6.16.1. The first was that the Commissioner had now to explain how he had forgotten about a whole series of five email messages he received in relatively quick succession during nine days after the recorded conversation. The difficulty became more acute because he had received these email messages in his private in-box to which no one else had access.

6.16.2. But the five emails taken together also reveal a further potential problem. It will be remembered that the message of 23 May 2011 had referred to the Commissioner as Mr. Gashu and that the Commissioner's final explanation for this was that she had probably forgotten his name. The trouble is that, while the first two messages sent on 14 May 2011 refer to the Commissioner as the Commissioner, the third (dated 16 May 2011) addresses him as Mr. Magashula;

and it is only in the last two messages dated 20 and 23 May 2011 that the appellation “Mr. Gashu” appears. The third message shows that she knew his name very well indeed. The idea that she had forgotten the name during the period 16 to 20 May 2011 is not attractive to us.

6.17. The second of the two occurrences mentioned in 6.15 was an interview we ultimately had with the Deputy Minister that led to a further interview with a person who cannot be named. We discuss this now.

Deputy Minister Nene

6.18. We had been told that the Deputy Minister too, had been approached by a certain person in Pietermaritzburg and told about the existence of the recorded conversation. The Deputy Minister confirmed a meeting with a certain gentleman who told him that there was a recorded conversation whose content was compromising to the Commissioner and that the Commissioner was indeed “in the pocket” of Mr. Marimuthu.

6.19. The Deputy Minister gave us the name of the person he had met. We made our own enquiries about this person, whose identity is withheld at his request because he says he fears for his safety. The Deputy Minister said that he drew this to the attention of SARS. As has been said earlier, the Deputy Minister confirmed this.

6.20. On 25 May 2013, two days after our third interview with the Commissioner, we met this person in Durban to see whether the Deputy Minister’s statement could be confirmed. What he said was indeed supported and we need say nothing more about this.

6.21. We were also told a number of other things by this person, including that the Commissioner had a much closer relationship with Mr. Marimuthu than we had been told. We were also told that when the conversation was recorded the Commissioner and Mr. Marimuthu were actually in Mr. Marimuthu’s house.

6.22. We treated the statements from this person with caution because of its hearsay nature.

6.23. On 28 May 2013, we interviewed the Commissioner for the fourth and final time to put to him matters arising from this new material. While the Commissioner admitted to being a close friend of Mr. Reddy, he continued to deny any close relationship with Mr. Marimuthu. He said that he met Mr. Marimuthu on occasions where he had been with Mr. Reddy and Mr. Marimuthu happened to be present. The generality of this explanation raises the real possibility that the two had met more than four times. No explanation beyond that already given was forthcoming when the difficulties posed by the additional two email messages were put to him. We also put to him the unsubstantiated allegation that the recorded telephone call had been made from the house of Mr. Marimuthu. We informed him that we had visited the restaurant in Umhlanga Rocks where the Commissioner said the recorded conversation had taken place and that our view, after experiencing the environment was that, the quiet clarity of the recording, made it improbable that the call had been made from that restaurant. The Commissioner attributed the quiet clarity of the recording by speculation that the recording had been cleaned. We have considerable doubt that the Commissioner was at that restaurant when the recorded conversation took place.

7. FINDINGS

7.1. We have reservations about the manner in which the Commissioner disclosed facts to us during the various interviews. It is regrettable that all the crucial information was not initially voluntarily given to us.

7.2. We place some reliance on the five email messages that Ms. Mba undoubtedly sent to the Commissioner.

7.3. We find it difficult to accept that the Commissioner forgot completely about a series of five email messages that had come to his private inbox from Ms. Mba during a period of nine days after he had solicited the CV. This lapse of memory becomes particularly difficult to accept if we have regard to the fact that he was described (according to him) in an insulting way in two of them. And it is difficult to understand why he did not remember the emails when the Deputy Commissioner arranged for him to listen to the recording during 2011, some months after the recording had been made. Finally, we cannot understand why he did not cause a search into his private inbox when he listened to the recording for the first time. The explanation that he left the matter in the hands of the Deputy Commissioner amounts to nothing. This is because it was his own private in-box that had to be looked into. So is the explanation for why he gave Ms. Mba his private email address (an obviously troubling factor) that he wanted her to remember it easily—that he did not want to wait while she fetched pen and paper.

7.4. We continue to have grave doubts about whether the recorded conversation took place while the Commissioner and Mr. Marimuthu were at the restaurant identified by the Commissioner.

7.5. We accept that the Deputy Commissioner relied on the statements made to him by the Commissioner and had no reason to question the integrity of the Commissioner in this regard until the emails were unearthed. The Deputy Commissioner was visibly shaken when the emails were discussed with him. The incorrect version given to us by the Deputy Commissioner was in our view not of his own making, but he had relied on the Commissioner.

7.6. We find that the Commissioner had, by his conduct, placed the reputation and credibility of SARS at risk. This conduct is briefly particularized:

7.6.1. The unprofessional, over intimate and almost haughty conversation with

Ms. Mba;

7.6.2. The fact that he gave Ms. Mba his private email address;

7.6.3 The fact that he did not check his in-box thoroughly, at any time before email messages from Ms. Mba were actually revealed;

7.6.4. The fact that he caused the Minister to make an incorrect statement;

7.6.5. The fact that the Commissioner's conversation with us was much less than frank than we would have expected of the person who had the integrity essential to his position; and

7.6.6. His extended interaction with Mr. Marimuthu;

7.7. We are unable to pronounce on the precise number of people who may have been involved in what we see as the attempt to blackmail the Commissioner.

8. RECOMMENDATIONS

In the light of these findings, we make the recommendations below.

8.1. Recommendations Concerning the conduct of the Commissioner

8.1.1. The conduct of the Commissioner does require sanction. This cannot ordinarily be done without a properly constituted disciplinary inquiry.

8.1.2. If the Commissioner does not accept the correctness of our finding, it will, we think, be necessary to institute full-blown formal disciplinary proceedings against him. We are of the view that there is enough evidence to warrant a

proper and full investigation by a body that has the power to compel.

8.1.3. We recommend that the Commissioner be suspended during the period of the investigation.

8.1.4. We must point out that, if the Minister should conclude, after interaction or an attempt to interact with the Commissioner, that there is a break in the relationship of trust between the two of them, none of the recommendations in this report precludes the Minister from exercising a discretion as he thinks appropriate.

8.2. SARS is a crucial institution in a democratic South Africa. There is no doubt that if this important institution loses credibility or is brought into disrepute, consequent upon the conduct of its employees, that conduct would have a direct effect on whether taxpayers will be honest in the determination of the amount of money they owe to the country. It is not far-fetched to say that the kind of conduct we are talking about here, if pardoned or remains unchecked, could result in considerable loss of revenue. This loss could have a serious impact on the ability on the government of this country to deliver services to bring about reconstruction and to address the inequities of the past. In addition, if this conduct is taken lightly, other senior officials of SARS might begin to think that they too can behave in the same way with relative impunity. The more senior the official involved the more serious the potential consequences. It is vital that in addition to the appropriate action against the Commissioner, every conceivable step is taken to make sure that all officials, in particular senior officials, conduct themselves with the required integrity and purpose. We see the consequences of not doing so as dire. We therefore make the recommendations below.

8.3. Other remedies:

8.3.1. Consideration should be given towards ensuring that the attached code of

conduct is adopted with binding force and fully implemented.

8.3.2. We also recommend that it would be entirely appropriate and helpful that a SARS programme specifically include orientation and education of all SARS personnel at regular intervals on the meaning and effect of the *Code of Conduct* as well the implications of the *Code* for behavior of SARS personnel on the ground.

8.3.3. We would suggest that orientation and education programs be appropriate to the seniority and job description of the personnel member concerned, and preferably, particularly in the case of senior officials, be conducted by people outside of SARS.

8.3.4. It would be helpful if, in the training of senior management, particular attention is paid to inculcating an understanding of the clause of the *Code* that provides: SARS officials must not make any statement without authority and outside the formal processes of SARS that expressly or by implication creates the impression that benefits are being conferred or may be conferred without required SARS processes being followed."

9. CONCLUSION

We are privileged to have been asked to do this work and trust that we have gone far enough and that our recommendations have sufficient force to warrant careful consideration.



ZAK YACOOB



M SIKHAKHANE

Date: 12 July 2013