

RealTime Transcriptions

TRANSCRIPTION OF THE

COMMISSION OF INQUIRY

SOUTH AFRICAN REVENUE SERVICE

BEFORE COMMISSIONER

THE HONOURABLE MR JUSTICE NUGENT (RETIRED)

ASSISTED BY

PROF M KATZ
MR V KAHLA
MS M MASILO

HELD ON

DAY 12

31 AUGUST 2018

PAGES 1938 - 2126

HELD AT

The Auditorium, 2nd Floor Lifton House, Brooklyn Bridge, 570 Fehrsen Street,
Brooklyn, Pretoria



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1 [PROCEEDINGS ON 31 AUGUST 2018]
 2 [09:00] COMMISSIONER: Thank you very much for
 3 giving us your time.
 4 MINISTER GIGABA: Good morning Judge and
 5 panel.
 6 COMMISSIONER: May I just ask you if
 7 you'll affirm that what you tell us will be the truth, the
 8 whole truth and nothing but the truth, if so will you say I
 9 do?
 10 MINISTER GIGABA: Should I stand up?
 11 COMMISSIONER: No.
 12 MALUSI GIGABA: I affirm.
 13 MS STEINBERG: Should we just take the
 14 name and swear in the other witness?
 15 COMMISSIONER: Sorry, is someone else
 16 going to talk to us as well?
 17 MINISTER GIGABA: Yes, I have with me the
 18 co-ordinator for the border management authority, Mr Elroy
 19 Africa who is going to, in case there are issues relating
 20 to that topic who is also going to be a witness on the
 21 topic.
 22 COMMISSIONER: Do you also affirm that
 23 what you say will be the truth, the whole truth and nothing
 24 but the truth?
 25 ELROY AFRICA: Yes I do, Judge.

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1 COMMISSIONER: Will you say I do.
 2 MR AFRICA: I do. Thank you.
 3 EVIDENCE BY MINISTER GIGABA AND MR AFRICA
 4 MS STEINBERG: Minister Gigaba, thank you
 5 for coming.
 6 MINISTER GIGABA: My pleasure.
 7 MS STEINBERG: You were the Minister of
 8 Finance between 31 March 2017 and 27 February 2018.
 9 MINISTER GIGABA: Indeed.
 10 MS STEINBERG: Our understanding is that
 11 it was during that period that you in fact initiated or
 12 called for this commission of inquiry. And I wonder if you
 13 could tell us why you thought it was necessary to do so?
 14 MINISTER GIGABA: Thank you very much.
 15 It is true that during the course of that term, I don't
 16 remember the date exactly, I made a call for the commission
 17 of inquiry into the South African Revenue Service. At the
 18 time we were concerned about various issues. The economy
 19 was in distress, there were various concerns that were
 20 being raised with me in the various roadshows, both
 21 domestic and international that I'd undertaken about the
 22 integrity of the revenue service which had to do with
 23 public perception and investor perception of the
 24 institution. They related to governance, they related to
 25 perception which had to do with its integrity, we had

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1 experienced a significant revenue shortfall amounting to
 2 about 50.9, close to R51 billion under collection. They
 3 related to illicit financial flows, they also related to
 4 tax morality, to a declining tax morality and from what we
 5 were picking up the tax morality issues were not merely
 6 about people just maliciously evading tax payments, but it
 7 was also people saying we will not pay taxes so long as
 8 there are credibility issues relating to the institution.
 9 And so I thought in order to deal with those challenges we
 10 need not just issue statements reassuring the public and
 11 the various stakeholders that the institution was stable,
 12 in good hands and credible.
 13 We needed a process that would itself be credible
 14 overseen by a Judge which would go, that would dive deep
 15 into the challenges that the institution was facing at the
 16 end of which we would emerge with recommendations that
 17 would address governance credibility issues, the integrity
 18 matters and any other issues emanating from the process
 19 which would assure the investors, the ratings agencies, the
 20 international financial institutions, the taxpaying public
 21 that indeed the institution was either in good hands, that
 22 the public perception was wrong or if the public perception
 23 was correct then which would propose far-reaching measures
 24 that would address those perceptions. But it seems to me
 25 that there were prima facie issues that were valid. The

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1 institution had not had prior to my appointment as Minister
 2 of Finance and to some extent even during my tenure as
 3 Minister of Finance, had not had a good relationship
 4 particularly with the National Treasury and so we needed to
 5 address those issues, particularly to address the issues of
 6 governance, of relations between the institution and the
 7 National Treasury, between the Commissioner and the
 8 Minister of Finance and the triangular relationship between
 9 the President, the Minister of Finance and the Commissioner
 10 of the South African Revenue Service.
 11 We needed to address all of those issues to
 12 resolve the conundrum, to clarify the roles and
 13 responsibilities because even if you look at the
 14 legislation, the SARS legislation it indicates that the
 15 Commissioner is appointed by the Minister of Finance but
 16 the, as it were, it is common cause that heads of
 17 departments and heads of entities are appointed and are
 18 accountable to the President and it's a delegated function.
 19 And so we needed to resolve that conundrum and so I thought
 20 we needed a commission which would address all of those
 21 issues, provide clarity, smoothing the relationship between
 22 the National Treasury and SARS and between the Minister of
 23 Finance and the Commissioner of the South African Revenue
 24 Service and that is why I made the proposal. And so I
 25 thought it would be far-reaching and would address not only

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1 the credibility issues and public perception but would
 2 resolve also the governance matters and assist us to know
 3 how to manage this relationship going forward.
 4 MS STEINBERG: Minister, just to pause at
 5 the credibility issue. You sent me a file of documents
 6 really supporting your view that there was internationally
 7 becoming a credibility problem. And I just want to read
 8 into the record two short extracts to give a flavour to
 9 what you're talking about. The first one is a World Bank
 10 systematic country diagnostic which was published on the
 11 30th April 2018 but it was actually developed during
 12 Minister Gigaba's term as Minister of Finance. And under a
 13 heading called "Strengthening accountability" it says, "The
 14 impact of state capture has been pervasive but strong
 15 political leadership could reverse it. Until very recently
 16 corrupt political interests have not only undermined the
 17 investigative independence of the South African Revenue
 18 Service but also disabled the National Prosecuting
 19 Authority which failed to take any substantive action in
 20 response to either the Gupta revelations or the evidence in
 21 the Public Protector's report of state capture", etcetera.
 22 So I note there that it's the undermining of the
 23 investigative independence of SARS that had come to the
 24 attention of the World Bank. And indeed Minister, you were
 25 right because we certainly have had evidence that that is

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1 the case, that it was undermined in this commission.
 2 And the second report I want to refer to is
 3 called "Sovereign risk pulse" and this is a feedback from
 4 the rating agencies, S&P, Standard & Poor, Moodies and
 5 Fitch Sovereign Credit Ratings review meeting. And it's
 6 dated 31 October 2017 to 8 November 2017. And one of the
 7 paragraphs in this report says, "Fiscal policy. The paths
 8 of fiscal's consolidation and debt stabilisation are
 9 heavily exposed to low economic growth and huge tax revenue
 10 shortfalls. The 2017 MTBPS revised down the tax revenue
 11 for 2017 by 50.8 billion, the largest shortfall since 2009.
 12 The MTBPS also announced that the expenditure could be
 13 breached by 3.9 billion in 2007 as a result of the
 14 recapitalisation of SAA and the Post Office. Given this
 15 rating agencies focus was on government strategies
 16 enclosing the revenue gaps as well as the role of the
 17 Presidential Fiscal Commission in sustaining public
 18 finances. The following questions underpin the discussions
 19 and the first one is how the gaps in the revenue, tax
 20 revenue will be closed."
 21 Do I understand correctly that that is the type
 22 of perception that you were talking about, Minister?
 23 MINISTER GIGABA: Indeed, among others.
 24 These were the issues that we were gravely worried about
 25 and that's why we thought you can't address those issues

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1 merely by issuing statements and reassurances. You needed
 2 a credible institution of the type of a commission to be
 3 able to provide such reassurances. And even though we were
 4 doing the work we were doing to respond to the gaps that we
 5 were seeing in the, that we announced in the MTBPS because
 6 the medium term budget policy statement was quite a, partly
 7 a departure from how the MTBPS would have been done
 8 previously in that whereas you would have announced a tax,
 9 a revenue shortfall you would also announce mergers to
 10 address those shortfalls.
 11 In the 2017 MTBPS we announced the significant
 12 gap and said we would respond to this significant gap
 13 through the Presidential Fiscal Committee and the
 14 announcements that we would make in the budget 2018, which
 15 we did. But the ratings agencies and the international and
 16 domestic investor community were concerned that you are not
 17 giving us something to hold onto. We don't know if you are
 18 giving up on the path of fiscal consolidation and the
 19 management of your fiscal framework and debt management.
 20 And looking at our debt projection over the medium term we
 21 realise that if we allowed it to proceed the way, without
 22 consolidating it, it was going to escalate beyond 60% in
 23 three years' time. And so they needed us to do something
 24 more drastic that would indicate our decisive and bold
 25 action on our part. But that we could deal with

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1 internally. And that is why we had to announce the mergers
 2 we announced in the budget in 2018 but there was something
 3 that needed to be done by the tax authorities because
 4 ultimately a large part of the revenue of the state comes
 5 from the tax authorities, the collection of revenue and for
 6 us to be able to collect the revenue for the state we
 7 needed to fix the credibility, the administration, the
 8 governance of our tax administration and so to do that you,
 9 we don't only needed to, we didn't only need to reform the
 10 tax administration, we had to deal with the credibility of
 11 the institution. We could take the step of tinkering with
 12 the leadership but we felt that there was something more we
 13 needed to do to address the credibility of the institution
 14 so that we provide a more profound, more in-depth approach
 15 going forward and that is why we made the proposal of a
 16 commission.
 17 MS STEINBERG: Well the consistent
 18 evidence we've heard here is that a significant portion of
 19 that 50.8 billion can be attributed to administrative
 20 problems in SARS. So it seems like you were correct.
 21 MINISTER GIGABA: A significant portion
 22 of it indeed, and an under-performing economy – and I think
 23 that also came out very sharply. I think it remains a
 24 concern if you look at where the state of our economy is
 25 even at the present moment, there is that concern because

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1 ultimately until you achieve significant growth, the
 2 question remains. And significant employment, the question
 3 remains where are you going to collect your revenues
 4 because people are not employed, incomes are not rising,
 5 the economy is not growing, the sectors, both corporates
 6 and income earners that are supposed to pay taxes are not
 7 there. But then you know we are not, we don't have the
 8 sufficient capacity to combat illicit financial flows,
 9 people are raising questions about the credibility of tax
 10 administration, so yes indeed that remains a significant
 11 contributor to revenue collection.

12 MS STEINBERG: Judge and panel, I'm about
 13 to move on to asking the Minister about the governance
 14 question and the relationship between the Ministry and
 15 SARS. Before I do so, do you want to ask questions on this
 16 topic?

17 PROF KATZ: Could I ask two, please?
 18 Minister, that was very helpful. You say repeatedly there
 19 were these concerns we thought we needed a commission, we
 20 thought we couldn't just tinker. Who was we?

21 MINISTER GIGABA: It was the Minister of
 22 Finance, the National Treasury. We had an agreement. I
 23 tabled these proposals to the President, the former
 24 President who had agreed with me. I tabled the same
 25 proposals to the new President, President Ramaphosa who

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1 also agreed with me and I think he then acted promptly in
 2 announcing and actioning the commission and that's why the
 3 commission was subsequently and promptly established.

4 PROF KATZ: Just one other one.
 5 Minister, you said there were these perceptions that all
 6 was not right at SARS and the credibility. Leave aside the
 7 perceptions, your own feeling as Minister, as the
 8 responsible Minister for SARS, what was your feeling about
 9 what was happening at SARS?

10 MINISTER GIGABA: I shared the same
 11 concerns and that's why I did not dismiss the concerns. I
 12 shared the same concerns and that's why I acted the way I
 13 did and with the determination and resolve that I did.

14 MR KAHLA: Minister, just following up.
 15 The concerns that you've shared, were they ever raised with
 16 the Commissioner and leadership of SARS by yourself?

17 MINISTER GIGABA: I did raise those
 18 concerns with the Commissioner on several occasions
 19 including when I first briefed him about my intention to
 20 propose a commission to the President. I discussed the
 21 issue of the commission with the Commissioner twice and I
 22 raised the issue of my concerns with him, I think on more
 23 than two occasions, beyond the issue of the establishment
 24 of a commission of inquiry itself.

25 COMMISSIONER: Minister, may I just ask

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1 you just on two things? From the evidence we've heard
 2 thusfar, and there may still be a lot of evidence to hear,
 3 there are two things that have stood out for me and that is
 4 the relationship between SARS and on the one hand of
 5 Treasury, Auditor-General, Finance Intelligence Service and
 6 it seems to be, from that evidence, it seems to be a soured
 7 relationship. I mean I've never heard of one government,
 8 one enterprise taking the other one to a court, for
 9 example, especially if it's the Auditor-General which has
 10 happened here. And there seems to be little communication
 11 with Treasury. The other is we've heard repeatedly
 12 evidence here from people who, senior management who work
 13 here, of the unhappiness that exists here. Now you talked
 14 about tinkering with leadership. It seems to me those are
 15 very fundamental problems for leadership, in other words
 16 they emanate from leadership, so I'm not quite sure why you
 17 talk about tinkering. Isn't an organ in an organisation
 18 the leadership sets the tone for the whole organisation, so
 19 it's a very fundamental thing is leadership? Do you agree
 20 with that?

21 MINISTER GIGABA: Absolutely. And I used
 22 the word "tinkering with leadership" because you can tinker
 23 with leadership, you can change them, you can change the
 24 musical chairs but unless you address the fundamental
 25 problems that you know result in the problems emanating,

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1 the problems will keep arising, you will change leadership
 2 and the problems will remain and you will change leadership
 3 and the problems are not addressed.

4 [09:20] So you need to address the problem at various
 5 levels. One, you need the leadership at all institutions
 6 to be matured enough to be able to work with one another.
 7 You need that maturity at the level of leaders. Whether
 8 they like one another mean by the time we meet as leaders
 9 we are old. We have more or less than 32 teeth in our
 10 mouths. So we are old enough, we didn't grow up together,
 11 we were not socialised together. We were not schooled
 12 together. We have different philosophies but we have been
 13 assigned particular responsibilities to, we, to execute, we
 14 have a responsibility to execute those responsibilities but
 15 we work for one government. The problem arises when I in
 16 executing my responsibilities and safeguarding my functions
 17 think that I will not listen to the other person and be
 18 able to work with them when I lack the emotional
 19 intelligence, the maturity to be able to work with the
 20 other person pursuing the same goals because to my
 21 understanding for example the, SARS, the AG, FIC, the
 22 National Treasury all have the common responsibility to
 23 combat illicit financial flows. In executing that
 24 responsibility they may have different mandates including
 25 the NPA and the Hawks. They may have different mandates

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1 but they all have to collaborate, to cooperate not only
 2 because the legislation requires them to do so but because
 3 it's in the interest of the state to combat illicit
 4 financial flows and ensure that South Africa's resources
 5 remain in South Africa.
 6 They have a responsibility to cooperate, to be
 7 able to put their respective and their common heads towards
 8 the same purpose. So you need the maturity of leadership
 9 and the emotional intelligence to be able to work together
 10 towards a common purpose. You also need the leadership to
 11 have the ability to lead their respective subordinates to
 12 also work towards that common purpose and so everything
 13 revolves around the leadership. The leadership is the
 14 fulcrum around which everything revolves.
 15 Now that becomes the critical issue. The
 16 legislation can only do so much in fostering collaboration
 17 and defining the common purpose. At the end of the day the
 18 warm bodies that occupy leadership positions have got to
 19 exercise that responsibility. That when the border
 20 management authorities established it will also involve the
 21 border management authority it serve the same purpose. It
 22 has been a particular concern to me, even in my capacity as
 23 Minister of Home Affairs when they have, there has been an
 24 instance where we had to at Home Affairs go to arbitration
 25 and even court with the AG to resolve certain audit issues

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1 that ultimately had to be resolved both first in court then
 2 in arbitration, that you could have resolved through
 3 thorough discussion and understanding.
 4 But it seems that there has been instances in
 5 recent times when there are matters that just, people dig
 6 in their heels and they are unable to resolve that can be
 7 resolved through thorough engagement and understanding of
 8 what the legislation sought to achieve and what we can do
 9 with flexibility without undermining the purpose of the
 10 legislation but to achieve the purpose for which the
 11 legislation was established in the first instance. And so
 12 we need to use these instances as lessons to try and get
 13 ourselves to that level where we are able to rely on the
 14 leadership to resolve those issues and I think what the
 15 Judge is asking me is an absolutely fundamental question
 16 which speaks as I say to the emotional intelligence and the
 17 maturity of leadership because at the end of the day as the
 18 Judge asks correctly the leadership is the fulcrum around
 19 which everything resolves. The legislation can only do so
 20 much. At the end of the day if the people who are
 21 occupying the leadership positions fail to exercise the
 22 leadership and with flexibility and without undermining the
 23 ultimate purpose of the legislation still are able to be
 24 flexible enough to resolve difficult issues then it would
 25 mean that the legislation itself would remain compromised

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1 because we would always have to keep changing the
 2 leadership because then we would have, what robots that
 3 just cannot understand what their responsibility is to
 4 implement and execute their mandates.
 5 COMMISSIONER: I mean a public enterprise
 6 one would expect particularly, I suspect you would agree,
 7 leadership to feel, to recognise that they are accountable
 8 to the public, they're accountable to Parliament, they're
 9 accountable to, well generally the population at large. If
 10 there are problems they should explain them. Do you agree
 11 with that?
 12 MINISTER GIGABA: Yes. You know we
 13 always have to and at times even when, at all times we have
 14 to be able to understand that and to be able to explain
 15 ourselves and account to those various institutions because
 16 even though no legislation will say to you, especially when
 17 you are employed as a bureaucrat in particular what we
 18 always remind the public servants for example at Home
 19 Affairs is that you are a servant of the public. You are a
 20 servant of the public. When we employ you we may not say
 21 to you, you are, you need to account to the public but the
 22 very title that you carry with you as a public servant
 23 means that you must be able to explain to the public and
 24 account to the public for what you and it's a, it's inborne
 25 in what you and I think for people at senior levels they

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1 need to have that understanding even more than those who
 2 occupy middle or junior management positions in the public
 3 service.
 4 COMMISSIONER: Okay. Is there any -
 5 MS STEINBERG: Anything else?
 6 MS MASILO: Advocate Steinberg, before we
 7 move to the next questions I just want to understand
 8 Minister, you said you did have discussions with
 9 Commissioner regarding the problems that have been
 10 highlighted even internationally. During those discussions
 11 did they acknowledge the problems and did he share with you
 12 what plans did he have to deal with those problems in light
 13 of you know the impact of the issues which were raised both
 14 nationally, I mean sorry both in South African and
 15 internationally on revenue collection?
 16 MINISTER GIGABA: Indeed we, in some, in
 17 the international roadshows we went along with the
 18 Commissioner. I remember in the April roadshow to
 19 Washington, New York and Boston the Commissioner, I invited
 20 the Commissioner to join us and so in the meetings of the
 21 World Bank, the IMF, the meetings with the ratings agencies
 22 in Washington. The meetings with investors in New York and
 23 Boston the Commissioner was there so he heard it himself
 24 what they were raising including responding to the
 25 questions there were, and concerns they were raising about

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1 the revenue service. The, and we also invited him to some
 2 other meetings domestically. So, and I met with the
 3 Commissioner on a one on one and I met with the executives
 4 of SARS I think twice or thrice if I'm not mistaken and
 5 they explained to me the programmes they were implementing
 6 to respond to some of the issues which had been raised
 7 including the issues of the lack of capacity to combat
 8 illicit financial flows, the issues of dealing with what
 9 was being referred to as the brain drain, the issues of
 10 dealing with the integrity of the commission, and all of
 11 those matters. The management of some of the prominent
 12 cases that were being dealt with so they did, they did
 13 indicate to me and I did feedback to them my own views
 14 about some of the issues which they were raising and how I
 15 thought they needed to deal with them but I think
 16 ultimately I felt that we needed to propose a Commission
 17 because I thought the, you know responding to the singular
 18 issues was not adequate. It would ultimately not give us
 19 and the concerned public and stakeholders a comprehensive
 20 enough response and picture that would give a guarantee
 21 that we are responding adequately and comprehensively to
 22 the concerns and issues that were being raised.
 23 MS MASILO: Thank you.
 24 MS STEINBERG: We can move off this
 25 topic. Minister, we received a submission from the acting

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1 Commissioner -
 2 MINISTER GIGABA: Sorry I've got a bout
 3 of flu.
 4 MS STEINBERG: Ah. We received a
 5 submission from the acting Commissioner a day or so ago.
 6 The purpose he says is to inform the Commission of
 7 information that has come into his possession regarding a
 8 trip by the suspended Commissioner to Russia in 2017 and we
 9 have here dated the 18th of November 2017 a request from
 10 Commissioner Moyane to you as Minister of Finance entitled
 11 urgent request for approval for the SARS Commissioner Mr
 12 Tom Moyane to travel to Russia Moscow from 18 November
 13 until 23rd November. I believe it was signed by Mr Moyane
 14 on the 17th of November and by the Minister on the 18th and
 15 the background is, I quote "there's an urgent need for me
 16 to meet with the head of the Russian Federal Tax Service to
 17 collaborate and sign off on a tax matter which requires me
 18 to travel to Moscow urgently. I'm available to discuss
 19 this matter in detail if the Minister wishes".
 20 The acting Commissioner says the following.
 21 "Standard protocol on all international travel, where the
 22 Commissioner is travelling is one, a request is either
 23 received from a foreign jurisdiction, sending an invitation
 24 or we are requiring a visit to a foreign tax authority.
 25 Our international relations team initiate a request for a

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1 visit detailing the background. Secondly, once
 2 confirmation or invite is received the foreign travel
 3 submission is prepared giving detail to allow the Minister
 4 to approve. Third, no bookings can be made prior to
 5 receiving the ministerial approval. Fourth, on completion
 6 of the trip the trip must be acquitted with all the costs
 7 as well as a report which must be provided to the Minister
 8 on the trip.
 9 In this case the following should be noted.
 10 Ministerial approval was granted for the trip with no
 11 information regarding the purpose of the trip. It simply
 12 speaks to, 'sign off on a tax matter.' This trip was
 13 signed off on the same day as the travel. The
 14 international relations team in SARS were not aware of the
 15 trip. The Ministry has no further information on the trip.
 16 I have written to the Commissioner, that's Mr Moyane asking
 17 him for details of the trip as well as the report to which
 18 no response has been received. I have asked various
 19 parties in SARS as well his office and they are not aware
 20 of the trip or its purpose." His conclusion is, "I would
 21 like the commission to note the fact that the circumstances
 22 and secrecy of this trip are very suspicious and if no
 23 specific matter was addressed such expenditure is fruitless
 24 and wasteful and would be in breach of the PFMA." Minister
 25 perhaps you can tell us what the purpose of the trip was

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1 and why you felt that you should sign off on it?
 2 MINISTER GIGABA: You know, I think I am
 3 in line with the acting Commissioner on this one. That I
 4 think the Commissioner should be required to provide
 5 detail. It does happen in government that there are urgent
 6 trips that are, that come up that authorities request
 7 ministerial approval for and you have to sign off because
 8 they are urgent and they travel, they provide detail for
 9 it, they provide reports afterwards for such trips. So in
 10 this case the request indicated that it's for an urgent tax
 11 matter that needed to be signed off.
 12 Now in this regard when such request come you
 13 take it that it's a matter that is, that involves tax
 14 issues and some of these tax issues are confidential. They
 15 obviously don't get explained in submissions and that
 16 proper reports are going to be provided after the trips are
 17 undertaken and I expected that it's part of the protocol of
 18 procedure on issues of this nature and so that's why it was
 19 signed off and so if the, if SARS itself was not aware and
 20 there are no reports that are available and the trip itself
 21 is not known to SARS and there are no documentation
 22 available to SARS I myself would be keen, like the acting
 23 Commissioner to know what was then the purpose of the trip,
 24 where was the trip going to and therefore necessary
 25 procedures must be undertaken to ensure that such

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1 information is availed and the resources be claimed back.
 2 MS STEINBERG: So Minister, just for
 3 clarity. Did you ask the Commissioner for details on why
 4 he needed to go before you signed?
 5 MINISTER GIGABA: No, I usually would not
 6 because a submission is provided because whenever there is
 7 a submission for the Commissioner to travel I signed off on
 8 the submission and took it that the information provided to
 9 me, I relied on the integrity of the person and never
 10 thought that the person would provide me with wrongful
 11 information. I think, and expected that a report would be
 12 submitted and so surely should it emanate afterwards that
 13 the information provided to me was wrong then disciplinary
 14 procedure would be undertaken afterwards.
 15 MS STEINBERG: And Minister, did you get
 16 any feedback from the Commissioner after his trip?
 17 MINISTER GIGABA: No.
 18 MS STEINBERG: NO.
 19 MINISTER GIGABA: I did not get any
 20 information and if I had, you see if I had any cause to
 21 doubt the reason or the authenticity of the request I would
 22 have sought the explanation and if afterwards I had any
 23 information that necessitated me to question the reason why
 24 the trip was undertaken then I would have also sought
 25 information.

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1 [09:40] Clearly after the trip is undertaken as is
 2 procedure even with ministers we are supposed to provide a
 3 report to the presidency for the President to know why you
 4 had gone, what is the report pertaining to the trip you had
 5 undertaken. The same is expected of the people who have
 6 undertaken trips. I think in the period between November
 7 and March a note was happening, preparations for the ruling
 8 party conference, preparations for the budget, I got
 9 occupied with those things and the report pertaining to
 10 this report would've slipped through during that time. But
 11 after that I surely would've had time to request reports
 12 relating to all of these trips and I would've had occasion
 13 to say but there is this trip, the report of which has not
 14 been provided to me, can I get a report relating to that
 15 trip and then take necessary steps about it.
 16 MS STEINBERG: But you didn't.
 17 MINISTER GIGABA: No, I didn't because I
 18 didn't have time afterwards to do it. As you know at the
 19 end of February I had to, there was a reshuffle that took
 20 place.
 21 MS STEINBERG: That's right. And finally
 22 so can we then infer from what you're saying that when you
 23 received that request your alarm bells didn't go off. You
 24 didn't suspect at that stage there was something
 25 suspicious?

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1 MINISTER GIGABA: They didn't go off
 2 because the Commissioner of the revenue service travels of
 3 necessity quite a lot for a number of reasons to different
 4 countries. Russia being one of the BRICS countries, I did
 5 not have any reason to suspect that there was anything
 6 wrong, unless somebody would've provided to me reason to
 7 suspect anything. At that time nobody provided any such
 8 reason to suspect anything. I honestly did not suspect
 9 anything.
 10 MS STEINBERG: I ask because the acting
 11 Commissioner suggests that there's usually a full
 12 motivation for the trip and this one is conspicuous in that
 13 it's missing that.
 14 MINISTER GIGABA: The only difference
 15 being that this was an urgent request and so if it was a
 16 normal request, if it was a normal request that says
 17 Minister, I request to travel within a week or two weeks,
 18 if it was not an urgent request I would've written back to
 19 say this request doesn't provide me any detail. Can you
 20 elaborate? As you would notice in a number of submissions
 21 that would've been provided to me in my time as Minister of
 22 Public Enterprises and my time as Minister of Home Affairs
 23 and my time as Minister of Finance, I would've commented on
 24 requests for travel that you are requesting for travel for
 25 the following officials. You don't explain to me why each

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1 one of these officials is doing on the following trip, why
 2 should we, why are you requesting travel for three instead
 3 of two or instead of one, why are you suggesting this or
 4 that. I would've commented on a number of those trips but
 5 this was a request for urgent travel to sign off on urgent
 6 tax matters.
 7 And so I expected that there would be a report
 8 provided to me afterwards since it was also for a three
 9 day, it was also a three day travel request. So I thought
 10 there would be a report submitted afterwards and certainly
 11 if there was anything wrong that I came to know about
 12 afterwards, necessary action would've been taken on my part
 13 to deal with that and unfortunately at the time the request
 14 came no information or allegation which would've caused
 15 suspicion on my part had come to my attention and therefore
 16 I didn't have any reason to be suspicious of anything, even
 17 as the acting Commissioner raise that if now, they also are
 18 not indicating what, other than saying there is no
 19 information, there are no protocols followed, they are not
 20 saying exactly what is the wrong thing that was done. And
 21 that's why I'm saying I'm on their side in seeking to find
 22 out if there was wrongdoing, what exactly therefore was the
 23 purpose of the trip, what was being signed off and why the
 24 commission did not know.
 25 MS STEINBERG: Judge, I don't have

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1 further questions but perhaps you and the panel do.
 2 COMMISSIONER: Can I just have clarity on
 3 -
 4 MS STEINBERG: Ja.
 5 COMMISSIONER: - that? When was that
 6 trip? The - what year?
 7 MS STEINBERG: 2017, November 2017.
 8 COMMISSIONER: And under the protocols to
 9 whom should the Commissioner report after the trip? To the
 10 Minister or -
 11 MS STEINBERG: To the Minister.
 12 COMMISSIONER: And when was the letter
 13 written by the acting Commissioner, requesting -
 14 MS STEINBERG: The information from -
 15 COMMISSIONER: Yes.
 16 MS STEINBERG: - Mr Moyane?
 17 COMMISSIONER: Yes.
 18 MS STEINBERG: I think very recently.
 19 COMMISSIONER: You don't have the date
 20 though?
 21 MS STEINBERG: I'll look for it.
 22 COMMISSIONER: Okay, well we can deal
 23 with it later. Thank you.
 24 MR KAHLA: On my side, Judge, just to
 25 understand, Minister, am I correct in understanding you to

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1 say when there was reference to a meeting concerning an
 2 urgent tax matter you considered it something that would
 3 fit within sort of taxpayer matters which would therefore
 4 be subject to confidentiality. Do I understand you right
 5 on that?
 6 MINISTER GIGABA: I thought it could be
 7 that or it could be a tax protocol or tax MOU issues
 8 because if the South African head of revenue service and
 9 head of tax administration in Russia, I considered it to be
 10 issues relating to memoranda of agreement between the two
 11 countries that there could be issues of co-operation
 12 between the two countries that need to be, that needed to
 13 be signed off on an urgent basis. And so allowed the trip
 14 to go on and then we will get the explanation and the full
 15 report afterwards.
 16 MR KAHLA: The reason I'm asking is I'm
 17 trying to understand whether an approach would've been
 18 different, for example, if you're dealing with tax
 19 memoranda which are international agreements -
 20 MINISTER GIGABA: Ja.
 21 MR KAHLA: - you would've expected, would
 22 you have expected more information upfront as opposed to if
 23 you're dealing with for example a taxpayer matter which by
 24 its nature would be considered to be confidential and you
 25 would've taken a different approach. Am I understanding

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1 you right or not?
 2 MINISTER GIGABA: It - you are right.
 3 You are right but as I say I thought that it's issues of an
 4 urgent matter, relating to taxation issues that could not
 5 wait and so they needed to be acted on with immediate
 6 effect and any delay probably could be disadvantageous to
 7 either individuals or both countries and so that's why I
 8 considered the matter to, I considered it necessary to
 9 allow the matter to proceed.
 10 MR KAHLA: In the ordinary course in
 11 relation to matters concerning for example international
 12 agreements, would there not have been pre-approval for
 13 that?
 14 MINISTER GIGABA: There would've been
 15 pre-approval, surely if he had put the matter directly as
 16 to sign off on an agreement, I would've said that look
 17 wait, I've not seen the draft agreement and an agreement
 18 surely would require that the political authorities, the
 19 head of tax authorities, the political heads of tax
 20 authorities in both countries must first converse, we must
 21 study the - the state law advisor must advise us on whether
 22 - so I would've said no wait a minute, this is not urgent
 23 but given the matter it is put here to sign off on a tax
 24 matter which requires me to travel urgently. I considered
 25 that to be a matter which is sensitive and urgent and let's

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1 allow it to happen and I will get a report afterwards.
 2 MR KAHLA: Okay.
 3 MS STEINBERG: Judge, the date that Mr
 4 Kingon wrote to Mr Moyane is the 28th of August 2018.
 5 COMMISSIONER: Thank you. Is that all?
 6 MS STEINBERG: That's all on this topic.
 7 COMMISSIONER: Is there more topics to
 8 deal with, with the Minister?
 9 MS STEINBERG: There's one more topic and
 10 that's the border management authority bill. Minister and
 11 Mr Africa, if I can just briefly summarise for you we've
 12 had submissions from three sources on this bill from
 13 customs, senior customs officials within SARS, from the
 14 South African Freight Forwarding Association and from
 15 National Treasury and they all express the same concern and
 16 that's that this bill is going to hamper SARS' capacity to
 17 enforce the laws with regard to customs and excise. And
 18 it's also going to slow down the process for business who
 19 are conveying the cargo and from SARS' point of view it's
 20 that at the moment they are able to have sight and
 21 visibility of the full value chain, including from foreign
 22 jurisdictions through their agreements as to - so that they
 23 can track the passage of any cargo from anywhere in the
 24 world to South Africa and then out of South Africa if
 25 necessary.

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1 The Treasury said that they think the risk to the
 2 economy is about R300 billion if this goes wrong and those
 3 are certainly the sort of figures that the Freight
 4 Association was talking about. Obviously it also, if there
 5 are gaps in that value chain there are holes opened up for
 6 illicit trade. And Treasury said they are absolutely in
 7 favour of legislation that mandates coordination between
 8 the various agencies and departments but that this bill has
 9 been put forward with no study underpinning exactly how
 10 this should happen. And therefore the fear is from all
 11 three sources that there will be fragmentation in the value
 12 chain and the left hand won't know what he right hand is
 13 doing if Home Affairs is brought into the picture in this
 14 manner. I think that's the summary of the problems and
 15 perhaps you can respond to it from your side.

16 MINISTER GIGABA: Thank you. Thank you
 17 very much. I have the unenviable role of having been on
 18 both sides of the spectrum in this debate. Though my views
 19 have remained consistent in that I've favoured the border
 20 management authority for, right throughout. I will perhaps
 21 allow, ask Mr Africa to make more extensive remarks in this
 22 regard but let me make a few remarks. The first one is
 23 that in actual fact the border management authority bill
 24 recognises wholeheartedly the role of SARS in revenue
 25 collection. It neither hampers nor divide it. It

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1 recognises, and that's why the bill was amended to insert a
 2 clause that says all revenue collected will go into the
 3 National Revenue Fund. So there's no division of where the
 4 revenue goes because we made it very clear from Home
 5 Affairs, from the outset that we have absolutely no
 6 intention of retaining any funds collected from the customs
 7 function at the ports of entry which after all constitutes
 8 10% of all customs functions in relations to the
 9 importation of goods to South Africa.

10 In that regard I know that National Treasury has
 11 said it's 20% of goods that are, that come through the
 12 ports of entries, whether it's 10 or 20%, ultimately even
 13 the fines that are collected there will be deposited into
 14 the National Revenue Fund. So there will be no hampering
 15 of revenue collection. The – therefore the risk to
 16 collection of R300 billion seems like a thumb, a what,
 17 thumb suck, it's based on nothing except probably a
 18 scarecrow to create a perception that there will be so much
 19 amount of money that's going to be lost when in actual fact
 20 that money collected whichever amount will go directly into
 21 the revenue fund.

22 MS STEINBERG: Minister, sorry to
 23 interrupt you. The problem that SARS and the Freight
 24 Association and Treasury have is not where the money will
 25 go. It's that what will be hampered is SARS' ability to

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1 collect that money because there will be communication
 2 gaps. SARS will lose sight of the value chain or will lose
 3 control of the value chain and therefore will be unable to
 4 collect the money. Rather than where the money will end
 5 up, I think there's no argument about that.

6 MINISTER GIGABA: But it's immaterial –
 7 COMMISSIONER: Sorry, excuse me,
 8 Minister, just one minute. Ms Steinberg, isn't this a
 9 debate better had in parliament? Is this really a matter
 10 in our terms of reference?

11 MS STEINBERG: Judge, it is to the extent
 12 that we are concerned with the way in which tax and customs
 13 should be governed, recommendations in that regard –

14 COMMISSIONER: Well is this a governance
 15 issue?

16 MS STEINBERG: Well I think the governing
 17 legislation is pre-eminently a governance issue.

18 COMMISSIONER: Well, yes, I must say I
 19 don't know if we go down this road. What do you think?

20 MR KAHLA: I'm pretty much inclined
 21 towards the direction of the Judge in this matter because I
 22 was a bit confused particularly on the, on what we're
 23 aiming at looking at. Are we looking at where they should,
 24 and I'm not so sure of course, I don't know the bill, is
 25 the bill requiring that the responsibilities in relation to

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1 the collection of customs revenue which are currently SARS'
 2 responsibilities to be actually carried out by different
 3 agencies? Is that what is the case?

4 MS STEINBERG: Yes.

5 MR KAHLA: But I still hold even in that
 6 view, I still would hold the view that that's ultimately a
 7 matter of the legislature to determine that having a
 8 bearing on, amongst others, the constitutional authority of
 9 the Minister to introduce money bills and related matters
 10 the Minister of Finance in relation to money bills.

11 MS STEINBERG: I have no problem with
 12 leaving it there.

13 COMMISSIONER: Mabongi, do you want to
 14 carry on along this line?

15 MS MASILO: No.

16 COMMISSIONER: You know, I think that it
 17 would, I'm not sure that it's the right thing for us to
 18 decide on what parliament should be looking at. So perhaps
 19 we shouldn't go down this road. Is that okay?

20 MS STEINBERG: That's fine with me, ja.

21 COMMISSIONER: Thank you. Is there
 22 anything further?

23 MS STEINBERG: I have nothing further
 24 unless the Minister has something in addition to say on
 25 anything.

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1 MINISTER GIGABA: No. No, I think I have
 2 nothing – I think I just would like to draw the attention
 3 of the commission, just in conclusion. No, I think I have
 4 nothing further, I think.
 5 COMMISSIONER: Well thank you very much
 6 for your time, we appreciate it and it's been very
 7 informative.
 8 MINISTER GIGABA: Thank you very much.
 9 MS STEINBERG: Thank you, Minister.
 10 MINISTER GIGABA: I appreciate it.
 11 [NO FURTHER QUESTIONS – WITNESS EXCUSED]
 12 MS STEINBERG: Judge, our next witness is
 13 Minister Nene.
 14 [10:00] COMMISSIONER: Good morning, Minister.
 15 MINISTER NENE: Good morning.
 16 COMMISSIONER: Thank you very much for
 17 coming and giving us your time. I'm sure you're a very
 18 busy man, but thank you very much indeed. Would you just
 19 affirm that what you tell us will be the truth, the whole
 20 truth and nothing but the truth? And will you just say I
 21 do?
 22 NHLANHLA NENE: I do.
 23 COMMISSIONER: Thank you.
 24 EVIDENCE BY MINISTER NENE
 25 MS STEINBERG: Morning, Minister Nene.

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1 MINISTER NENE: Good morning, Carol.
 2 MS STEINBERG: You were the Minister of
 3 Finance between the 25th of May 2014 and the 9th of December
 4 2015 and you are again the Minister of Finance and we'll
 5 ask you questions relating to both of those periods. We've
 6 heard evidence from Bain that part of the assurance they
 7 had in implementing the new operating model was that the
 8 Commissioner assured them that the Minister of Finance had
 9 given his approval to the new operating model. And I'm
 10 aware that Commissioner Moyane sent you, as Minister of
 11 Finance, two short memoranda relating to this, the first
 12 being on the 11th of November 2014 and the second being on
 13 the 5th of August 2015. And perhaps you can comment on what
 14 it was that you approved.
 15 MINISTER NENE: Thank you. Indeed there
 16 were two letters or two memoranda, the first was a request
 17 if I were to say that the reason for the application to
 18 procure Bain's or to proceed with the process was in order
 19 to re-launch the SARS brand. He says in the memo "It is
 20 imperative that I" and I quote from the memo "that I begin
 21 the process of re-launching the SARS brand by embarking on
 22 a comprehensive overhaul of the organisation in all
 23 aspects. My intention is to strengthen and revitalise the
 24 governance and ethical framework so that the organisation
 25 makes a fresh start after the toils of the past two years."

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1 As you would know during that time, it was just
 2 immediately after the unceremonious departure of the
 3 previous Commissioner, so the organisation was indeed in a
 4 difficult phase. He went on to then state the areas that
 5 he would like to enhance, revenue collection, operational
 6 performance, the SARS infrastructure, organisation and
 7 governance and the image and perception. So the intentions
 8 were noble indeed and it was for that reason that he was
 9 given the go ahead. Let me also indicate that this was an
 10 operational matter and the Minister only had to endorse a
 11 process with the hope also that once the implementation
 12 proceeds it'll be reported on, progress would be reported
 13 to the Minister with regards to their achievement of the
 14 objectives that I have referred to.
 15 MS STEINBERG: It's correct that in terms
 16 of the SARS Act the Commissioner merely has to advise the
 17 Minister on these kind of operational matters. And in fact
 18 we have an affidavit from Minister Gordhan who says that he
 19 in fact tried to stop Mr Moyane from implementing the final
 20 phase of the new operating model relating to customs. But
 21 that the Commissioner ignored him and defied him which will
 22 lead us to the second topic which is really the question of
 23 governance and how the relationship between the Ministry
 24 and the Commissioner can perhaps be strengthened. But
 25 before we go there I wonder if there are any questions

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1 about the first topic which is what it is that the Minister
 2 approved in terms of the new operating model.
 3 PROF KATZ: Advocate, can I just pose –
 4 MS STEINBERG: Please, Professor Katz.
 5 PROF KATZ: Minister, what I'm
 6 understanding from you, you simply approved the process,
 7 not the result of the process.
 8 MINISTER NENE: Correct.
 9 PROF KATZ: So these were the categories
 10 that they wanted to look at.
 11 MINISTER NENE: Yes.
 12 PROF KATZ: And you approved that,
 13 nothing more.
 14 MINISTER NENE: Which made sense because
 15 for any organisation in order for it – if you want to
 16 revitalise the organisation and to improve its efficiency
 17 it is important and we've had a number of such at the
 18 Revenue Services.
 19 PROF KATZ: Thanks.
 20 MR KAHLA: Minister, there's reference
 21 there to a comprehensive overhaul, when you make reference
 22 to approving the process were you approving the process to
 23 give rise to a comprehensive overhaul?
 24 MINISTER NENE: Look there was going to
 25 be a process to arrive at the overhaul, but it meant that

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1 the organisation in the view of the new Commissioner did
 2 need an overhaul, so it would have then have been of
 3 assistance to see which areas. And the areas are mentioned
 4 that you want to enhance the revenue collection, they want
 5 to make sure that those areas are strengthened. So indeed
 6 it might – even though overhaul might actually be a very
 7 strong word, but the intention is an intention of improving
 8 the efficiency and efficacy.

9 MR KAHLA: Just my last question, this
 10 matter was brought before you, Minister, for approval, but
 11 was your approval really necessary for this and I suspect
 12 it's going to be a matter that follows the theme around the
 13 governance and the decision making powers as between the
 14 Minister and the Commissioner. Was it really a matter that
 15 required the Minister's approval to go ahead or could it
 16 have gone ahead without the Minister's approval?

17 MINISTER NENE: Indeed it would have gone
 18 ahead without the Minister's approval, but I think it was
 19 only – as he said, I mean in the second memo you'd see that
 20 he says it's the confirmation and concurrence, but
 21 ultimately approval is actually only in principle. But
 22 other than that it is just concurring or endorsing more
 23 than anything in terms of the legislation. The
 24 Commissioner could have proceeded without the Minister
 25 because it's an operational matter.

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1 COMMISSIONER: Ms Steinberg, sorry what
 2 is the date of the first memorandum?

3 MS STEINBERG: It's the 11th of November.

4 COMMISSIONER: Of '14.

5 MS STEINBERG: 2014. Minister, the
 6 second memorandum it does in fact include an annexure
 7 called Update on the Organisational Model. And one of the
 8 documents here is that final operating model, that
 9 organogram that we saw yesterday that was given. But I
 10 must comment that, Minister, we were looking at that
 11 yesterday afternoon and frankly it took us hours to
 12 understand the implications of that organogram and we had
 13 the consultants who designed it to explain to us. So I
 14 guess you get something like this and it's not entirely
 15 clear what the implications are.

16 MINISTER NENE: Indeed, Ma'am and again
 17 when a person who is closely related to the business
 18 because other than the narrative also because my focus was
 19 more on the narrative that this organogram is going to
 20 strengthen the hand of SARS in performing its duties as
 21 you'd have seen that among other things it is the area of
 22 the Large Business Centre and the other elements being
 23 brought together. But it turned out, with hindsight now,
 24 it turned out also that it wasn't about – it didn't
 25 actually achieve that intended objective. And I would have

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1 then also hoped that with a professional company which was
 2 advising and in fact the company that was advising was a
 3 company that had advised one of our institutions, the
 4 Development Bank of Southern Africa and was able to
 5 actually turn it around. I found it very strange that in
 6 this instance that very same company produced a different
 7 outcome. And therefore it was my belief and conviction
 8 that the intention is indeed to strengthen the
 9 organisation.

10 MS STEINBERG: Minister, that's
 11 interesting because one of the areas we were probing
 12 yesterday with Bain was the significance of their stamp of
 13 approval on the new operating model. And we suggested to
 14 them that in the context of a public organisation rather
 15 than a private one where an internationally, well an
 16 international company with a good reputation gives its
 17 stamp of approval. It's something that the Minister would
 18 rely on and you're confirming that.

19 MINISTER NENE: Indeed. Ja and that is
 20 why, I mean judging by what I heard from yesterday's
 21 engagement with Bain I'm utterly disappointed.

22 MS STEINBERG: Can I move off this topic?

23 MS MASILO: Minister, you mentioned,
 24 sorry in respect of the first memo you mentioned one of the
 25 reasons as being, I mean provided for the complete overhaul

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1 as being the impact of the unceremonious departure of the
 2 previous Commissioner. In your view, as the Minister at
 3 the time, was there a huge negative impact especially on
 4 revenue collection and staff morale as a result of the
 5 events that happened at that time?

6 MINISTER NENE: It was more of the
 7 reputational damage to the organisation that actually
 8 ensued as a result of that, but of course that would
 9 consequentially, you know, have an impact also on staff
 10 morale. But it wasn't – at that time, as you would know,
 11 what would be able to show that would be the subsequent
 12 engagements with the organisation and indeed it also did
 13 have an impact on the morale of the staff.

14 MS MASILO: So that would have justified
 15 the changes, the complete overhaul in the organisation as
 16 proposed by the Commissioner.

17 MINISTER NENE: Look more than anything
 18 as long as it addresses the issues that are mentioned
 19 because if you look at strengthening and revitalising the
 20 governance and ethical framework and then it talks to -
 21 anything that would bring revenue for me is music. If
 22 somebody says what I'm going to do is going to improve
 23 revenue collection which is what I always preach because
 24 even now under very tough economic conditions the only
 25 thing I preach they all are breathing 1.345 which is 1.345,

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1 1 trillion and 345 million that I'm looking for this year
 2 under tough conditions. So it's revenue, revenue and
 3 revenue. But more than that operational performance, the
 4 infrastructure, organisation and governance, all of those
 5 if we couldn't have them it is something that I would
 6 really go along with.
 7 MR KAHLA: Am I getting you right,
 8 Minister, that you didn't necessarily share the view that
 9 the institution had been in turmoil, but you simply were of
 10 the view that the institution needed enhancements –
 11 MINISTER NENE: In order also to inspire
 12 confidence?
 13 MR KAHLA: Ja.
 14 MINISTER NENE: That is true.
 15 COMMISSIONER: May I just ask you,
 16 Minister, did you yourself think it needed enhancement or
 17 are you relying on the Commissioner, the Commissioner's
 18 view that it needed –
 19 MINISTER NENE: There is no room for
 20 complacency in an institution like SARS. All the
 21 Commissioners that have come in have always tried to take
 22 it to the next level. As we will have seen in the first
 23 turnaround where I had the privilege of serving in
 24 Parliament and the focus with the then Commissioner Gordhan
 25 was actually a series of those, you know, reviews. And one

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1 of the panellists actually was part of assisting the
 2 turnaround way back and after that when the other
 3 Commissioner, Mr Magashula came in we built on the strength
 4 of what had been achieved by the previous one. So I would
 5 have then thought that if somebody comes in and were are in
 6 the environment that we are in it is important that we
 7 actually step up the game.
 8 MS STEINBERG: Minister, we'd like to
 9 hear your views on the governance question, the question of
 10 the relationship between the Ministry and SARS, you've been
 11 in a unique position of being Minister or rather a number
 12 of different commissioners have reported to you. We're
 13 interested in hearing about what you think the weaknesses
 14 in the current system are and how you think they may be
 15 improved.
 16 MINISTER NENE: Firstly I think the
 17 relationship between the Minister and the Commissioner are
 18 critical even though – I mean I think the legislation
 19 itself does not, you know, provide a clear framework in
 20 order to be able to execute that. Because the Minister
 21 being the executive authority and the Commissioner being
 22 the accounting authority of the institution with the
 23 appointment being at a presidential level there normally is
 24 when the Presidents appoints and the Minister signs the
 25 employment contract and you know and that's what regulates

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1 the relationship from there.
 2 But also there is the SARS Act, there is also the
 3 Public Finance Management Act and I think there does need
 4 to be some kind of alignment in order to be able to
 5 regulate that. But at times it also entirely relies on
 6 personalities because you might have all the, you know the
 7 governance framework in place, but personalities also do
 8 play a role in that environment. And I must say that, you
 9 know, during that period from 2014 to 2015 we were almost
 10 working on an environment where we first had a period of an
 11 acting Commissioner for some time who had been in the
 12 system for a long time. So personalities came into play
 13 and it was much smoother, but then we then had to deal with
 14 a new Commissioner coming in, having to allow him space
 15 without second guessing the new Commissioner.
 16 And that was for a very short period because it
 17 was towards the end of 2014 and then 2015, the reporting
 18 period of 2014, at the end of the financial year, had more
 19 to do with the previous Commissioner. And one left, I left
 20 then before the finalisation of the reporting period. But
 21 the engagements one has which are more of monthly meetings,
 22 as an oversight instrument for the Minister. They actually
 23 proved to be very useful because that's where you are able
 24 to monitor and manage the performance, getting regular
 25 reporting. But again during that period I think because

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1 of, you know, the change of personalities and the
 2 introduction of a number of other governance, not
 3 necessarily governance, but operational measures and under-
 4 performing economy, one had to also be faced with a
 5 situation where performance on the revenue side was the
 6 main and the key issue. And you'd recall that during that
 7 time there were issues with regards to the so called Rogue
 8 Unit at SARS. And when I realised that that was beginning
 9 to take away the attention of the Commissioner from
 10 focusing on the core function of the organisation we then
 11 had to appoint a Minister's advisory committee to be able
 12 to deal with those matters rather than having the
 13 Commissioner focusing on them. And I recall saying that
 14 you know you are now between three judges as the
 15 Commissioner. We had the Davis Tax Committee looking at
 16 strengthening our tax collection and revenue side. And we
 17 also had Judge Kroon looking at these reputational issues.
 18 [10:20] But also looking at governance as well, and we
 19 also had, on the other side had just since about 2014 again
 20 or 2013 we had the office of the Tax Ombud. So with three
 21 judges, what more would you be asking for?
 22 MS STEINBERG: Minister, what everyone
 23 seems to agree on is that it's the personality of the
 24 incumbents that counts more than anything else because you
 25 can't legislate a relationship in detail. Minister Gordhan

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1 says in his words that the organisational effectiveness,
 2 credibility and reputation of a tax authority is determined
 3 by the integrity of its leadership, their technical skill
 4 and knowledge and expertise and experience and
 5 accountability and transparency. Now based on that he then
 6 puts a lot of emphasis on the appointment procedure, as
 7 it's critical as to who gets the job and how they are
 8 vetted. And he makes a number of recommendations in that
 9 regard. I wonder if you could start by telling us what the
 10 current appointment procedure is and how Mr Moyane was in
 11 fact appointed?

12 MINISTER NENE: Firstly, the appointment
 13 is by the President, as I said earlier and once the
 14 President has, because you first receive applications.
 15 There is an advert and people apply. I'm informed here by
 16 my Director General Dondo Magajane that he was actually
 17 chief of staff when the applications came to the department
 18 and he then, I think there about 127 applicants. And which
 19 then the names would then be forwarded to the Presidency
 20 and then the Presidency would then make its selection and
 21 once the President has arrived at a name to appoint through
 22 his processes, there would then be a Presidential minute
 23 that would be signed by the Minister and the President and
 24 the person is so appointed. When a person has been
 25 appointed – and that's what happened with Mr Moyane – and

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1 when a person is appointed then the Minister and the
 2 Commissioner enter into an employment agreement which is
 3 signed by both.

4 MS STEINBERG: So do I understand
 5 correctly that 127 applications came in and that President
 6 Zuma selected one out of those 127 and that was the
 7 procedure.

8 MINISTER NENE: Well I wouldn't be privy
 9 to the process of shortlisting until arriving but on the
 10 time then we enter the process again this is when the
 11 President has made his choice.

12 MS STEINBERG: What Minister Gordhan
 13 suggests instead and perhaps you can comment on this is
 14 that there should be wide advertising and then shortlisting
 15 and then rigorous interviews and competence testing. He
 16 says the shortlisting process should take account at least
 17 of academic and technical qualifications, relevant
 18 management experience, leadership experience of large
 19 complex organisations, a detailed and deep functional
 20 understanding of the relationship between SARS, the
 21 Treasury and the broader economy of South Africa, a track
 22 record of integrity and professional service and the
 23 ability to credibly communicate with the public at large.
 24 He also says that the shortlisting process should make
 25 provision in accordance with normal executive practice for

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1 participation by current office bearers in senior positions
 2 in SARS and the Treasury and may include participation by
 3 registered tax practitioners and civil society. Following
 4 shortlisting interviews and competence testing should be
 5 conducted and thereafter a recommendation should be made by
 6 the executive authority through the Department of Public
 7 Service and Administration to Cabinet taking account of the
 8 results of the selection process. That recommendation
 9 should lead to the appointment by the President or his or
 10 her nominee in consultation with Cabinet. What are your
 11 views on that proposal?

12 MINISTER NENE: Well that's a very rich
 13 and elaborate account of, from a veteran in both areas,
 14 both in the institutions of SARS but also as Minister of
 15 Finance. And also I think it is informed by experience in
 16 that area for what has happened. I would support anything
 17 that would improve the integrity of the process. I
 18 wouldn't want to go into the detail of to which parts of it
 19 I would support and perhaps would like to have a different
 20 view, but I think anything that would actually result in
 21 the selection of the best candidate for the job but also a
 22 candidate that would inspire the confidence and the
 23 integrity of the institution that it requires.

24 MS STEINBERG: I think Professor Katz,
 25 you have a question here.

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1 PROF KATZ: May I please, counsel?

2 MS STEINBERG: Please.

3 PROF KATZ: Minister, this is a very
 4 comprehensive process giving lots of stakeholders an
 5 opportunity. The one thing it doesn't have, I will be
 6 grateful to have your views, do you think it needs any
 7 parliamentary intervention?

8 MINISTER NENE: That's why I said I did
 9 not want to go into detail because that's precisely the
 10 point I would have actually made that I think Parliament
 11 might actually, it might make sense for Parliament to be
 12 part of the process. But at the risk of, such an elaborate
 13 process might actually have its own downside of perhaps
 14 being quite cumbersome and might take long and instances
 15 where, like at the moment where we have acting
 16 Commissioners, where you have an acting Commissioner that
 17 the legislation provides for a period of three months, of
 18 90 days at any given time to appoint. So I think one of
 19 the things that should be looked into also is how that
 20 process can actually be structured such that it is, its
 21 elaborate nature does not result in it taking long.

22 MS STEINBERG: Minister Gordhan and Mr
 23 Magashula also say that once the appointment has been made
 24 they recommend that the current reporting systems between
 25 the Commissioner and the Minister be formalised and

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1 strengthened because it seemed to be a question of practice
 2 but not one of necessity. And it broke down entirely. The
 3 Treasury told us a couple of days ago that that
 4 relationship, that reporting and the ability for the
 5 Minister to play that check and balance role broke down
 6 because the regular meetings between the Commissioner and
 7 the Minister just stopped happening. So the suggestion
 8 here is that be formalised and that there be a requirement
 9 that there are "granular and particular reports" prepared
 10 by SARS to ensure thorough oversight. Would you agree with
 11 that, Minister?

12 MINISTER NENE: Indeed. I would really
 13 support that. I think it is important as I said that
 14 whilst the regulatory framework does not necessarily
 15 produce those results but it is important so that even when
 16 personalities are at odds, but at least there is something
 17 that regulates the relationship.

18 MS STEINBERG: Mr Kahla?

19 MR KAHLA: Thanks. Minister, I really
 20 just wanted to understand, I would like to understand how
 21 that relationship worked with you and the current
 22 Commissioner, and perhaps I'm trying to figure out whether
 23 in terms of practice it worked well for you or you would
 24 have required a few things to be put in place to make it
 25 better or, especially because this issue has been raised

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1 around personalities. It may well have not worked well
 2 between the Commissioner and Minister Gordhan but it may
 3 have worked perfectly for you, and while I talk about you,
 4 I also look at it from the expectations of the Treasury.
 5 Did you see that relationship working well?

6 MINISTER NENE: Look there's no perfect
 7 relationship, but there could be a professional
 8 relationship in an environment where we share the same
 9 objective. And I must say in the period that I worked with
 10 the Commissioner we had a number of issues to deal with and
 11 as I said earlier I reached a point, there were some
 12 instances, like I said, I ended up having to appoint the
 13 Kroon Commission because I felt that the Commissioner was
 14 paying too much attention to the so called rogue unit
 15 rather than focusing on the revenue collection which was
 16 the core function. And but I think we handled that matter
 17 quite maturely but I continued to have my reservations in
 18 terms of from time to time having to call the Commissioner
 19 to order in order to focus on the revenue collection.

20 COMMISSIONER: What troubles me a bit
 21 Minister, is that we've heard evidence of the strained
 22 relationship with Treasury, such that meetings that used to
 23 be held are no longer held. There's an issue of the
 24 Commissioner taking the Auditor-General to court which is a
 25 most unusual situation and suggests a very strained

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1 relationship there. There's a strained relationship with,
 2 apparently with the Davis Commission – we'll hear about
 3 that I believe Judge Davis is here. There's a strained
 4 relationship with the Financial Intelligence Centre and
 5 does that not all trouble you? It troubles me that there
 6 are so many strained relationships.

7 MINISTER NENE: It does. It does, indeed
 8 it does because it also goes to the heart of a fully
 9 functional institution because if there are those
 10 relationship issues. And I think during my tenure,
 11 especially during the 2015 period the focus was more on,
 12 for me saying let's focus on revenue collection. I
 13 understand these are the issues and if they need to be
 14 dealt with there is a place for them to be dealt with but
 15 let's focus on revenue collection. And I must say that
 16 during that period our monthly meetings did take place and
 17 we actually were very robust in dealing with focus on
 18 revenue collection. Indeed there was beginning to be an
 19 issue with regards to inability to meet our targets, both
 20 as a result of an under-performing economy but at the same
 21 time not paying adequate attention to closing the tax gap
 22 but that now was also parallel with the study that was
 23 being conducted by Bain on the other side, hoping that when
 24 that is concluded, which unfortunately I was not around to
 25 be able to see the outcome, but some of those results, and

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1 as you say they might have been part of the engagement
 2 between SARS and the Davis Committee as well because they
 3 would be presented to the Kroon Committee which was an
 4 advisory to the Minister but I never got to see the final
 5 outcome.

6 COMMISSIONER: Yes, Ms Steinberg?

7 MS STEINBERG: I have no more questions
 8 for the Minister here.

9 MR KAHLA: Thanks a lot. Minister, in
 10 the presentation by Bain yesterday it submitted or
 11 suggested that the issues that bedevil SARS had lesser to
 12 do with what it proposed to SARS in relation to the
 13 structure than the leaders that had to operate that
 14 structure. What's your impression of that? I mean you saw
 15 the outcome around what was proposed. Did you expect what
 16 was proposed by, what was brought to you following the Bain
 17 process would result in what actually said to have
 18 resulted, in relation to the ineffectiveness of SARS?

19 MINISTER NENE: I'm actually, as I said
 20 I'm disappointed because that was the direct opposite of
 21 what my expectations were. I would have expected that it
 22 would actually enhance the operations and it would improve
 23 the performance of the institution and it is indeed quite
 24 disappointing that that was not the case. And as I said
 25 earlier also about Bain that I actually feel something must

Page 1990

1 have gone wrong with that organisation.
 2 MR KAHLA: But you shared Bain's view
 3 that it was not so much what they proposed than the people,
 4 the warm bodies that had to operate within what was
 5 proposed, that it was actually an issue of leadership that
 6 resulted in the ineffectiveness, leadership within the
 7 institution rather than the structure of the organisation.
 8 MINISTER NENE: Well but that's, I would
 9 imagine that's the same leadership that had actually called
 10 for those recommendations and I would imagine that they
 11 would be better placed to implement them. And if it is the
 12 same leadership also that was not able, then there is a bit
 13 of a challenge. I mean I don't have an opinion on whether
 14 Bain only thinks, it could be in their defence to say no,
 15 no, it's not what we presented, it's the people. But I
 16 haven't had an opportunity actually of studying their
 17 presentation here.
 18 MR KAHLA: I suppose the reason I'm
 19 asking this question is that at the end of the exercise
 20 there was a report, my understanding, around what was to
 21 happen. You were comfortable in terms of what was on
 22 paper.
 23 MINISTER NENE: Correct.
 24 MR KAHLA: To happen would meet the
 25 objectives that had been raised with you at the start of

Page 1991

1 the process.
 2 MINISTER NENE: Yes.
 3 PROF KATZ: Sorry, may I? Minister, one
 4 of the important elements of our terms of reference is a
 5 governance framework for SARS. We've discussed the
 6 appointment of the Commissioner. Now the Commissioner's
 7 appointed. The governance processes thereafter, there are
 8 two compartments, tax issues, non-tax issues. On the non-
 9 tax issues one of the things we're looking at and we also
 10 will ask Judge Dennis Davis, is the possibility of an
 11 oversight board on the non-tax issues which would pick up
 12 early warnings of problems in SARS, administrative issues.
 13 What would your view be on a board that would serve as an
 14 oversight of the administrative functions, not the tax
 15 functions of SARS?
 16 MINISTER NENE: I would support that and
 17 I think it would also fill the gap of not always having to
 18 appoint advisory panels from time to time and having
 19 commissions because at least you will have that oversight
 20 institutionalised.
 21 MS MASILO: Minister, the appointment of
 22 the senior management of SARS in terms of the SARS Act
 23 should be done with the approval of the Minister. Now
 24 looking at the events that happened while you were still
 25 the Minister of Finance previously, during the previous

Page 1992

1 period of 2015, especially around or which affected the
 2 senior staff members at SARS, you know the exodus of the
 3 most experienced staff members, would the strain in the
 4 relationship between the Ministry and the Commissioner have
 5 prevented the Minister in intervening in any way or in
 6 assisting in any way with the events which affected the
 7 senior staff members?
 8 MINISTER NENE: The issue of the senior
 9 staff members was actually a bit of a tricky one because as
 10 you would know the limits within which the Minister also
 11 exercises his oversight in terms of that area. Where there
 12 would be issues between the Commissioner and his executive,
 13 you would allow for due processes to unfold and
 14 unfortunately some of them actually would have resulted in
 15 some of those voluntarily leaving and it turns out now that
 16 some of them were not necessarily voluntary departures, but
 17 there were a number of areas that were very concerning at
 18 that time and, but the Minister would intervene to the
 19 extent that the Minister would be able to get information
 20 from the Commissioner and the Commissioner would be, would
 21 explain the reasons for issues at hand, but that's only how
 22 far the Minister could go, then that you would be micro-
 23 managing the institution.
 24 [10:40] MS STEINBURG: Minister, one last
 25 question from my side, the question of SARS' bonuses your

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1 DG and his team showed us that during years where SARS was
 2 in fact under collecting they voted themselves large
 3 bonuses for top leadership. Mr Gordhan's suggestion on
 4 this count is that it's appropriate for the Minister of
 5 Finance to approve bonuses and executive remuneration as
 6 recommended by the Human Resource committee contemplated by
 7 the SARS Act, would you agree with that?
 8 MINISTER NENE: I fully support that
 9 view.
 10 MS STEINBERG: There does seem to be no
 11 sense in somebody approving their own bonus.
 12 MINISTER NENE: Own bonus, ja.
 13 MS STEINBERG: Okay.
 14 MR KAHLA: Just a quick follow up on
 15 this. Minister, the bonuses that were paid during the
 16 period you were Minister would those have been approved by
 17 the Minister or would they have been approved by SARS
 18 excluding the Minister? Without the Minister's approval?
 19 MINISTER NENE: I would have to go into
 20 the records because again as I said at times you would find
 21 that even those things that could otherwise have been
 22 approved by the Commissioner, the Commissioner would seek
 23 concurrence with the Minister. I would just have to go
 24 into the records to confirm or not.
 25 COMMISSIONER: Well I think the position

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1 is that was one of the areas of conflict is that Minister
 2 Gordhan says these are times of austerity.
 3 MINISTER NENE: Correct.
 4 COMMISSIONER: And you shouldn't pay the
 5 bonuses to yourselves and the Commissioner said well it's
 6 my decision, and it's got nothing to do with you and there
 7 was an area of conflict and I think there are legal
 8 opinions and everything about that. Am I right?
 9 MS STEINBERG: That's correct, Judge.
 10 MINISTER NENE: But then during my period
 11 I would just have to go into the records whether they
 12 actually were submitted to us for concurrence or approval.
 13 MS STEINBERG: Perhaps you could let us
 14 know, Minister.
 15 MINISTER NENE: I will.
 16 MS STEINBERG: In the fullness of time.
 17 Thank you.
 18 MINISTER NENE: I will, maybe I could
 19 assist with that.
 20 COMMISSIONER: Thank you very much
 21 Minister for giving us your views. I'm sure they will be
 22 very helpful. Thank you.
 23 MINISTER NENE: It's fine.
 24 MS STEINBERG: Thank you Minister. DG
 25 may I just ask you if, has the -

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1 MINISTER NENE: Just a second.
 2 MS STEINBERG: Has the procurement
 3 officer come to give testimony today?
 4 MR KAHLA: Was he asked?
 5 MINISTER NENE: No. Is he coming, yes.
 6 MS STEINBERG: He is coming?
 7 MINISTER NENE: He's coming after lunch,
 8 yes.
 9 [NO FURTHER QUESTIONS – WITNESS EXCUSED]
 10 MS STEINBERG: Oh after lunch. Is that
 11 correct, Mr Momoniat, after lunch?
 12 MS STEINBERG: Oh okay, thank you.
 13 COMMISSIONER: Are we going to hear Judge
 14 Davis first or second?
 15 MS STEINBERG: We're going to hear Judge
 16 Davis first. Would it be convenient to take a break first?
 17 COMMISSIONER: I think if we're going to
 18 hear Judge Davis we ought to.
 19 [INQUIRY ADJOURNS INQUIRY RESUMES]
 20 [11:06] COMMISSIONER: Right, Ms Steinberg, are
 21 we ready? Are we ready?
 22 MS STEINBERG: We are ready, Judge.
 23 COMMISSIONER: Good morning, Judge Davis.
 24 Thank you very much for coming up here. Did you come from
 25 Cape Town or Bloemfontein? I don't know.

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1 JUDGE DAVIS: No, Cape Town.
 2 COMMISSIONER: Well thanks for coming
 3 all –
 4 JUDGE DAVIS: Pleasure.
 5 COMMISSIONER: - the way. Will you
 6 affirm that what you tell us will be the truth, the whole
 7 truth and nothing but the truth? If so will you just say I
 8 do?
 9 JUDGE DAVIS: So help me God.
 10 EVIDENCE BY JUDGE DAVIS
 11 MS STEINBERG: Judge Davis, we really
 12 have the two specialists in the country on tax
 13 administration and governance, you and Professor Katz and
 14 really we envisage this session as more than anything a
 15 discussion between the two of you on how to optimise the
 16 current governance model to ensure the best functioning
 17 SARS and the most accountable SARS. And I really would ask
 18 Professor Katz to kick off.
 19 COMMISSIONER: Can I just ask you, I've
 20 read your report –
 21 JUDGE DAVIS: Yes.
 22 COMMISSIONER: - and you talk about this
 23 board.
 24 JUDGE DAVIS: Yes.
 25 COMMISSIONER: I'm interested not only in

Page 1997

1 the appointment but governance and control during the
 2 period of the appointment –
 3 JUDGE DAVIS: Yes.
 4 COMMISSIONER: - and that's where your
 5 board I think comes in.
 6 JUDGE DAVIS: Yes. I'll talk about that
 7 with pleasure, whenever you want me to. Ja.
 8 PROF KATZ: So I could just contextualise
 9 that?
 10 JUDGE DAVIS: Yes.
 11 PROF KATZ: Thanks Advocate. It seems to
 12 us that the governance at SARS is at three stages. 1, the
 13 appointment of the Commissioner, 2 having been appointed
 14 the whole governance model and 3, the removal. So those
 15 are the three phases of governance and having identified
 16 the three phases of governance there are just some criteria
 17 we think would inform a lot of it. 1, the autonomy of
 18 SARS, 2 the independence of SARS, 3 taxpayer secrecy, 4
 19 administrative efficiency.
 20 So, Judge, if you don't mind, if we can start
 21 with the appointment phase. How should the Commissioner of
 22 SARS be appointed? We've read your report, the evidence
 23 leader this morning read a lot of the evidence we've had
 24 from previous Minister and Commissioner Pravin Gordhan.
 25 Then we had Mr, Minister Nene and the question is your

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1 views on how the appointment of the SARS Commissioner,
 2 we'll be grateful to hear.
 3 JUDGE DAVIS: Okay. I think, can I just,
 4 your point is absolutely right that what one's grappling
 5 with is just a conceptual problem which is if you could
 6 call it a semi-autonomous body. I should just say and I'm
 7 happy to give you the document, the OECD did a report about
 8 9 years ago on 43 countries, it's extremely helpful.
 9 Because what they tried to do is to try to distil the
 10 fundamental principles of governance to address the
 11 questions that you're talking about and the reason why I've
 12 got to go back is because SARS is not a, it's difficult to
 13 conceive of it as a completely independent body from the
 14 Treasury or the Minister and I say that because if the
 15 Minister actually has to get up and present a budget and
 16 we've seen that happen for the last few years and then
 17 finds himself or herself as the case may be in a situation
 18 where there's a significant shortfall, not to through
 19 Minister's fault but because of the incompetence of the
 20 institution, just take that as a hypothetical for the
 21 moment. Well then what is the Minister supposed to do?
 22 You can't uncouple the two. So the thing that we were
 23 grappling with the case was how do you actually develop
 24 some level of autonomy for SARS which flows directly from
 25 the work that you and I did in the Katz Commission on the

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1 one hand and an appointment procedure which allows a level
 2 of autonomy but not such a level of autonomy that the
 3 Minister or the Treasury or anybody else for that matter
 4 can't do very much about it. And our argument, I think,
 5 was this that the one thing we know is that the present
 6 system is hopeless but that's a strange system because it
 7 wasn't the system of 1997.
 8 In 97 as you know of following the Katz
 9 Commission's recommendations it was the Minister who was to
 10 appoint. And weirdly, I don't know if you've noticed this
 11 that actually that's still partly the case, not in terms of
 12 appointment, but in terms of accountability in relation to
 13 customs and excise. Nobody bothered to change that act.
 14 So when the SARS Act was changed in 2002/2003 to
 15 give the President the power to appoint and therefore
 16 effectively that the President was the person over who,
 17 presided over the SARS Commissioner and the Minister was
 18 powerless to do anything else, that was not true for
 19 customs and excise where the provision, the old provision
 20 still applied which was said that the Commissioner reports
 21 to the Commissioner and is accountable, the Commissioner
 22 appoints the Minister, reports to the Minister and is
 23 accountable to the Minister. So oddly enough the Ministers
 24 of Finance could've done a hell of a lot in my view legally
 25 in relation to Mr Moyane when it came to the customs side

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1 which as we know had huge sorts of problems.
 2 So we've got a very – the system, the legislation
 3 at the moment just completely at war with itself. The
 4 point I – we put up two proposals, Professor Katz. The one
 5 was a parliamentary process which would be similar to the
 6 public protector that people could apply for the job of the
 7 Commissioner of Inland Revenue. They would then be
 8 subjected to a committee of parliament with proper public
 9 hearings and names would then be provided, perhaps you
 10 don't have to one name. You could do the same as the
 11 Judicial Service Commission does in the Con-Court where you
 12 have to provide the President with three or four names and
 13 the President picks one. That's one possibility. Now of
 14 course when we put up that recommendation a whole lot of
 15 people said to us but it doesn't really work and let me not
 16 get involved in the intricacies of the Public Protector but
 17 the fact is a lot of people said see, it didn't work there.
 18 So it's – none of these systems are completely flawless but
 19 that's one approach.
 20 The other approach would be of course for the
 21 Minister to make a recommendation which would then have to
 22 be approved by parliament which is a sort of American
 23 Confirmation Hearings. Both of those have this advantage
 24 that at least you'd have the public know whether the
 25 Commissioner knew anything about tax and was a competent

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1 person. The way it worked with Mr Moyane as I understand
 2 it was that out of 127 people, my understanding was that
 3 there were a whole host of highly qualified people who were
 4 totally discarded and out of the glomming came Mr Moyane
 5 and the real question you have to ask in a case like that
 6 is well what due diligence was done including did he know
 7 anything about tax, would he have been able to know the
 8 difference between gross income and taxable income? And
 9 these aren't facetious remarks, these are really very
 10 important remarks. So we know that the procedure there was
 11 utterly hopeless. So the one advantage of the
 12 parliamentary process would at least be that daylight is
 13 and publicity is the best disinfectant and one could go
 14 that route. That's one way. The other route following
 15 from Judge Nugent, Chair's comment is the possibility of
 16 having a board.
 17 PROF KATZ: Sorry, but what is defect of
 18 the first one? You –
 19 JUDGE DAVIS: There is no basic defect of
 20 the – well let me go back. None of these are perfect
 21 because they go to the heart of something fundamental and
 22 since I've said this in other context let me say this now.
 23 We know that parliament failed as mechanism of
 24 accountability over the past decade. It's got nothing to
 25 do with tax, that's the reality. We know that because all

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1 sorts of things were allowed to happen without proper
 2 parliamentary scrutiny. So you're always working with an
 3 assumption, Professor Katz, that the parliamentary process
 4 is actually going to work as the constitutional designers
 5 had in mind. But assuming that it does work in that way,
 6 then it's a relatively decent way it seems to me of doing
 7 it and at least this, that, but I would go further, if I
 8 may. I don't only think that it's the Commissioner that
 9 should be appointed that way, I think we should have two or
 10 three deputy commissioners appointed in exactly the same
 11 way and if you permit me I'll tell you why I say so.
 12 Because if you take the present situation, if there were
 13 two or three deputy commissioners appointed independently
 14 of the Commissioner who essentially have total independence
 15 of their own the possibility that they may have spoken out
 16 or of being a deterrent on what you have clearly heard in
 17 so much of your evidence and indeed what I heard throughout
 18 our tenure would probably have been less the case.
 19 Because the – I want to make the point, the
 20 biggest problem that one had here was a culture of fear.
 21 Everything that you've heard was known. I certainly knew
 22 almost, people from SARS were telling me this all the time
 23 but they wouldn't tell me publicly because of the culture
 24 of fear. So the question is can you construct a situation
 25 where it's not just dependent on one person but to spread

Page 2003

1 the authority out to have deputy commissioners who equally
 2 are independent of a Commissioner who's bent on a
 3 particular form of conduct.
 4 PROF KATZ: But, Judge, the deputies
 5 would become relevant after the appointment process –
 6 JUDGE DAVIS: Well yes –
 7 PROF KATZ: - that would be in number 2
 8 phase –
 9 JUDGE DAVIS: - but you could –
 10 PROF KATZ: Yes.
 11 JUDGE DAVIS: Yes.
 12 PROF KATZ: But – and you want them to be
 13 appointed in the same way –
 14 JUDGE DAVIS: I would.
 15 PROF KATZ: - as the –
 16 JUDGE DAVIS: I would recommend that.
 17 One way or the other I would want that and by the way that
 18 is true of other tax authorities around the world which
 19 have deputy commissioners and in fact if you look at the
 20 sort of Australians and the Canadians and the English
 21 there's a team that runs this show and people feel a sense
 22 of independence. They feel they can't simply be leaned
 23 upon or put upon by one person in circumstances whereby
 24 that person is not doing what they should be doing. So ja.
 25 PROF KATZ: When you come to having been

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1 appointed, when we come to phase 2 how it will operate –
 2 JUDGE DAVIS: Ja.
 3 PROF KATZ: - what the distribution of
 4 power is between the Commissioner and the three deputies.
 5 JUDGE DAVIS: Well can I just say this,
 6 just the other alternative proposal was in a sense to have
 7 some board which could be –
 8 COMMISSIONER: May I stop and if I'm
 9 allowed to intervene in this debate –
 10 JUDGE DAVIS: Yes.
 11 COMMISSIONER: - when you have your three
 12 deputies though, who has the power? Can the Commissioner,
 13 does he have the final say?
 14 JUDGE DAVIS: I think he'd probably,
 15 Chair, I think he'd obviously have to have a final say but
 16 the way it works in other countries is these deputies are
 17 designated to do certain tasks. They run let's say the
 18 computer system, the assessment system, etcetera. So power
 19 is diffused. I mean the fact is if you really want to know
 20 what was going in SARS at this particular point in time my
 21 impression was that the Commissioner actually was not hands
 22 on in the slightest. Every time I met him I had a, Mr
 23 Makwakwa was the person who came to tell me what I wanted
 24 to know to the extent that I was going to get any
 25 information at all. But I didn't get it from the

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1 Commissioner. So what I'm trying to say is I think that
 2 you wouldn't want one person to, and I don't think it's
 3 possible -
 4 COMMISSIONER: Sorry, just finish the
 5 sentence, you wouldn't want one person to?
 6 JUDGE DAVIS: To run the whole, you know,
 7 to, if you've got this sort of pyramid structure you're
 8 asking for trouble and I don't think it's possible in a
 9 sophisticated revenue authority, meaning the way it works
 10 in these other countries is that the work is apportioned
 11 between the Commissioner, the deputy and there's an
 12 executive management team that runs the show with
 13 particularly designated roles to deputies.
 14 PROF KATZ: But deputies is the
 15 alternative to the board.
 16 JUDGE DAVIS: No, well deputies are -
 17 irrespective I'd have deputies.
 18 PROF KATZ: Whether or not you have a
 19 board?
 20 JUDGE DAVIS: Well I think there should
 21 be deputy commissioners in the Inland Revenue who do
 22 certain – look, prior to the – one of the – sorry let me go
 23 back. One of the issues that I understand and you've
 24 probably heard evidence to this effect, that allowed for a
 25 change in the model was the allegation and I won't put it

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1 further than that, that there was one person, Mr Hore, who
 2 really had huge power in the organisation and the idea was
 3 that wasn't healthy and so suddenly he wanted to diffuse
 4 power. So and that points not an incorrect proposition,
 5 it's a question of what they did with that problem as
 6 opposed to what they should've done. So what I'm trying to
 7 say, Professor Katz, is that if the Australians and the
 8 Canadians and the Americans and the English have an
 9 executive team of commissioners and deputy commissioners
 10 with designated roles and a level of independent tenure I
 11 think that's much more helpful.

12 PROF KATZ: Can I just add a dimension
 13 here?

14 JUDGE DAVIS: Ja.

15 PROF KATZ: There are two functions that
 16 a Commissioner has. One are the tax functions –

17 JUDGE DAVIS: Yes.

18 PROF KATZ: Tax- forget about policy but
 19 taxpayer exercise the discretions in tax matters and
 20 administrative non-tax.

21 JUDGE DAVIS: Yes.

22 PROF KATZ: I think what we were hearing
 23 is in the administrative functions a board could suffice.
 24 That board would have nothing to do with tax functions.
 25 What I'm hearing you say the deputy commissioners would be

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1 involved with the Commissioner in tax functions. So you
 2 could have deputy commissioners to assist on the tax
 3 functions and the board's involvement is on administrative
 4 functions.

5 JUDGE DAVIS: Well take a simple
 6 proposition, if you want, as I understand and quite rightly
 7 so, that because I understand Mr Kingon quite rightly has
 8 brought this back, the large corporate centre which was a
 9 disaster when it was taken away, why would you not have
 10 somebody with the authority of a deputy Commissioner
 11 running that? It's a crucial function. You don't need the
 12 Commissioner to do that and you want somebody who's
 13 confident enough, they've got tenure, they can run the show
 14 without fear or favour and they're accountable to the
 15 Commissioner but the fact is that they've got some
 16 operational autonomy of their own. I mean this is a
 17 massive organisation and no private company of such size
 18 would simply defer everything to one person.

19 PROF KATZ: Okay, is that more semantic
 20 or otherwise that means that –

21 JUDGE DAVIS: No, I'm talking about –

22 PROF KATZ: Can a head of a large
 23 business centre who is not a –

24 JUDGE DAVIS: Yes.

25 PROF KATZ: - deputy Commissioner.

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1 JUDGE DAVIS: I agree. I'm just giving
 2 you an illustration. What I'm trying to suggest is that by
 3 diffusing power and by having a management committee like
 4 they have in other countries, chosen in the same fashion,
 5 you give people a level of independence and you want as
 6 much as possible to create a culture of independence so
 7 that you can never get back to the same situation that
 8 we're in, we got ourselves into where one person in the
 9 most extraordinary fashion created a culture of such fear
 10 that everybody else knew they were wrong and they weren't
 11 going to do anything about it.

12 PROF KATZ: But one thing I would suggest
 13 if, with the Judge's permission and to stop this being a
 14 Punch and Judy show, the –

15 JUDGE DAVIS: As long as I'm not Judy.

16 PROF KATZ: Ja, I didn't have that in
 17 mind. I think, with respect, one thing we need to be
 18 careful about is in constructing a new governance model we
 19 should look at best practice and that and not be overly
 20 concerned at overcoming what was probably unique in what
 21 happened here.

22 JUDGE DAVIS: Yes. But I think -

23 PROF KATZ: And I do think –

24 JUDGE DAVIS: Sorry, to interrupt you but
 25 I think that is best practice.

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1 PROF KATZ: No, but I'm saying –

2 JUDGE DAVIS: Because – ja.

3 PROF KATZ: - we – some of the things
 4 we've heard that happened here were perhaps unique. We
 5 mustn't be, I'm suggesting to the Judge and the panel and
 6 Carol that we should have a structure that is right and not
 7 overly concerned about preventing a total recurrence of
 8 what appeared to have happened here. That's the only point
 9 I make.

10 JUDGE DAVIS: I accept that but if for
 11 example best practice allows for a level of accountability
 12 and independence and integrity in an institution so much
 13 the better. All I'm saying is that when you go through and
 14 as I've done discuss this with revenue authorities around
 15 the world, it does appear to me that works best is an
 16 executive committee of people properly appointed and I
 17 think that that they should, I think that deputy
 18 commissioners should be properly appointed with the
 19 Commissioner. That having been said –

20 PROF KATZ: Sorry, is that for tax
 21 functions and –

22 JUDGE DAVIS: Ja, for tax functions.

23 PROF KATZ: - administrative functions?

24 JUDGE DAVIS: Yes, I suppose so. I
 25 haven't thought about the second part but I suspect the

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1 answer is yes. That doesn't mean ultimate responsibility
 2 doesn't rely with the Commissioner. Your alternative to
 3 the parliamentary process would be to have a board chaired
 4 probably by an independent person. When I suggested that
 5 perhaps it should be a retired Judge, you know, people said
 6 are you looking for a job beyond the – that's not what I
 7 had in mind but it did seem to me, I know we tried with
 8 Judge Corbett at one point and I'm not entirely certain why
 9 that all failed but it did. I accept that and you probably
 10 might have found that out better than I, but the fact is
 11 that the notion of having a board with an independent chair
 12 who has absolutely no clients to speak of and is totally
 13 out of the process but has knowledge and then having a
 14 series of independent, if you could an almost non-executive
 15 types on a board, it seems to me – and there are all sorts
 16 of different mechanism for best practice for that. The –
 17 certain countries now have for example an Australian
 18 Inspector of Taxation who actually is a body that looks at
 19 the revenue. It is a separate body not an ombud but
 20 actually looks at performance.
 21 [11:26] You could have a board, that board if properly
 22 constituted could itself make suggestions, give a list from
 23 which the Minister would have to choose a SARS Commissioner
 24 and Deputy Commissioners. That's another alternative.
 25 PROF KATZ: So the board would have two

Page 2011

1 functions.
 2 JUDGE DAVIS: Yes.
 3 PROF KATZ: One, the ongoing oversight
 4 function.
 5 JUDGE DAVIS: Ja.
 6 PROF KATZ: And two, the involvement in
 7 the appointment of the Commissioner?
 8 JUDGE DAVIS: What it would do would be
 9 that, because there will be an expert independent party,
 10 assuming that you've got a 100 people applying for the SARS
 11 Commissioner's job they would then make a short list of say
 12 six or seven, they could do the interviews themselves, here
 13 are people who really know what they're talking about, you
 14 take it out of the political domain into a technical domain
 15 and you say to the Minister here are our six choices and he
 16 then makes his decision accordingly.
 17 COMMISSIONER: Well it begs the question
 18 who appoints the board?
 19 JUDGE DAVIS: NO I accept that, I think,
 20 and I think that board would have to be appointed probably
 21 by government but then on the other hand we've got certain
 22 levels of precedent for that, which say we could look
 23 towards the South African Reserve Bank's board structure,
 24 the non-executive directors how they're appointed and have
 25 a similar structure there. It is a possible model that we

Page 2012

1 can adopt. We put this up, Judge Nugent as just two
 2 separate attempts to think through the problems, I'm not
 3 saying they're perfect but both of them are a hell of a lot
 4 better then what we've got at the moment.
 5 PROF KATZ: And who is the board
 6 accountable to?
 7 JUDGE DAVIS: Well the board would
 8 essentially advise the Minister as such and would
 9 ultimately be accountable to the Minister to the extent
 10 that, well once you've decided who appoints them they'll
 11 have to be accountable to that party but let's, but the
 12 board would ultimately work with the Minister and advise
 13 the Minister. It's a much more sophisticated model I
 14 suppose of the tax advisory committee which you chair and
 15 which I was on for a number of years.
 16 COMMISSIONER: The problem seems to me
 17 that why one can't simply adopt UK or whatever, there's a
 18 lot more political accountability in those countries and
 19 that seems to be very important. Now in my lifetime I
 20 expected to live only, under only two governments, the past
 21 one and this one. There isn't as much political
 22 accountability that's the facts of the matter and so you
 23 don't have that pressure on the government to appoint the
 24 right person. You can appoint the board but somebody's got
 25 to appoint the board, it could be government at the end of

Page 2013

1 the day and as we heard from Mr Momoniat yesterday you know
 2 the structures, the legal structures weren't strong enough
 3 to resist some things.
 4 JUDGE DAVIS: Well that's -
 5 COMMISSIONER: You can never create that.
 6 JUDGE DAVIS: I accept that and that's
 7 why I started off by saying that you have to work on the
 8 assumption that our constitutional structure works at least
 9 half well, if I can put it that way. I'm with you. That's
 10 my anxiety that any particular proposal that one puts up
 11 has to work on an assumption and that assumption is that
 12 people who are appointed behave with the level of public
 13 integrity and when they do something wrong they resign.
 14 You know the problem that we've got in South Africa is very
 15 often people don't resign, they get promoted rather than
 16 resign and you know how you engender that culture, Judge,
 17 is, I agree is a massive problem. What we're grappling
 18 with, within that -
 19 COMMISSIONER: Yes, one would assume that
 20 -
 21 JUDGE DAVIS: These are flaws. I am
 22 working with the basis that with some level of publicity,
 23 some level of accountability the hope that the tradition
 24 develops that somebody who is a really, you know serious
 25 chair of a board taking their job very seriously would

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1 create a tradition where that body would work really well.
 2 Now there are instances in South Africa where that does
 3 work perfectly well.
 4 COMMISSIONER: The, sorry.
 5 PROF KATZ: The tension I'm finding in
 6 preparing this chapter for the chair here is there's a
 7 tension and the big tension that arises on the one hand you
 8 don't want political interference.
 9 JUDGE DAVIS: Yes.
 10 PROF KATZ: In the tax functions of a
 11 Commissioner.
 12 JUDGE DAVIS: Yes.
 13 PROF KATZ: It's fundamentally important.
 14 So there you want some distance between a Commissioner and
 15 a Minister. But on functional, so the Minister of Finance
 16 is responsible for the financial performance of the
 17 country. The borrowings, the tax, the expenditure and
 18 there you would want him to be integrally involved in the
 19 taxing function. To me that tension is one of the
 20 important issues that one grapples with in getting the
 21 right governance model, what would be your view on that?
 22 JUDGE DAVIS: Well I agree and that's why
 23 I started off by saying there's an inherent tension between
 24 a relatively autonomous body called the Revenue Authority
 25 on the one hand and on the other hand that it has a

Page 2015

1 political set of implications. Meaning it has to interface
 2 with the Minister. Now if you look at the OECD report
 3 where they studied 43 countries it appears that in all of
 4 the cases the Minister of Finance or his or her equivalent
 5 has a general oversight view over the revenue service. In
 6 all of them. Right -
 7 PROF KATZ: Do we have a copy?
 8 JUDGE DAVIS: I'll give you this, I'll
 9 leave this with you, Professor Katz.
 10 COMMISSIONER: Can you just explain what
 11 a general oversight role is?
 12 JUDGE DAVIS: Well I -
 13 COMMISSIONER: Does he have authority
 14 over it?
 15 JUDGE DAVIS: Well at least this, they
 16 have to, yes.
 17 COMMISSIONER: Report.
 18 JUDGE DAVIS: Yes, they have to report.
 19 They have to report to the Minister and in almost all of
 20 these cases, bearing in mind of course where it doesn't
 21 work here is that in most of these cases Australia and
 22 Canada the Governor General in counsel is the person who
 23 appoints the Commissioner. So obviously they remove the
 24 Commissioner, say when you report to the Minister, if the
 25 Minister really doesn't like what you're doing go back to

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1 the Governor General in Council and get you removed. But
 2 it is a sense in which you're obliged to report to the
 3 Minister and I have doubt about it that you have to have
 4 some official reportage to the Minister. If you take what
 5 happened here Judge Nugent, my own experience, and you know
 6 I'm in the unique of having had worked with a whole range
 7 of Ministers since we got appointed. I don't need to tell
 8 you I think we had something like about five ministers, you
 9 know two of Minister Gordhan, two of Mr Nene, Mr Gigaba and
 10 Mr Van Rooyen for a weekend. So I've worked with a lot of
 11 ministers and these ministers had a real problem and their
 12 problem was -
 13 COMMISSIONER: Did you work that weekend
 14 by the way.
 15 JUDGE DAVIS: For the weekend I didn't do
 16 anything, no. Just despair. But the rest of the time when
 17 you spoke to a Minister and you said Minister I'm hearing
 18 unofficially, you know the following and when for example
 19 our job, if I could just, say would be, where the Minister
 20 would call us in and say we're short of 30 billion, how
 21 we're going to get that and we would probe these questions
 22 including questions of the contribution of Tax
 23 administration to that and I would point out to the
 24 Minister that we're not, you know they're not doing enough
 25 on based to ratio profit shifting, they're not doing enough

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1 on corporate tax etcetera, etcetera. The Minister would
 2 almost shrug his shoulders and say well what do you want me
 3 to do because there is absolutely no basis by which the
 4 Minister could then call the Commissioner to account. We
 5 can't have that system.
 6 So the Minister has have some supervisory role
 7 over the Commissioner. It may be that if you go either the
 8 board route or perhaps even the parliamentary route then
 9 the question of removal is not the Minister's function
 10 which gives you a supervisory role without being able to
 11 say you know I don't like you because you know you're a
 12 Liverpool supporter and therefore you've got or some other
 13 irrationality. I think that's possible but I do think that
 14 you have to have some ministerial supervision over a
 15 Commissioner, it just doesn't work otherwise.
 16 PROF KATZ: Could I move to another topic
 17 with, while we got outside of governance, while we've got
 18 you.
 19 COMMISSIONER: May I just ask one more
 20 question, sorry.
 21 PROF KATZ: Go ahead.
 22 MR KAHLA: I just want to understand,
 23 just going back to the board issue and the points you've
 24 raised in relation to providing oversight. I suspect that
 25 you're not suggesting that that board would have in the

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1 exercise of its oversight any power to second guess the
 2 determination that either the Commissioner or Deputy
 3 Commissioner would have made in relation to tax matters.
 4 JUDGE DAVIS: NO, no, no. The board, Mr
 5 Kahla the board, I think would have a much more helicopter
 6 view. You know it would be, Judge Nugent asked me earlier
 7 and I really did try to spend as much time as I could on
 8 this, it's a very difficult question and I don't have a,
 9 I'm sorry to say I don't have a proper answer for it. He
 10 asked me well what happens in the circumstances where
 11 things are going wrong. What do you do then? Short of
 12 let's say a firing, going through the removal and I do
 13 think that a board would be able to give advice, whether to
 14 the Commissioner or the Minister or both about broad
 15 issues, broad principles.
 16 We did have that tradition of the tax advisory
 17 committee. I think it could be revamped and I remember
 18 spending, when I was a member of your commission a lot of
 19 time with Jill Marcus who was then the Deputy Minister of
 20 Finance trying to reconfigure that body precisely for that
 21 end. But I'm, of course it would, and one of the problems
 22 if you can't have about a body like that is people sort of
 23 coming along and saying, you know my client has got a
 24 problem and how do we solve that. That's not what the body
 25 is about at all. It doesn't deal with individual tax

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1 matters. It deals with policy questions and it may have to
 2 deal with performance questions and think about this, if
 3 there was such a body there's been a lot of debate about
 4 you know how much the SARS inefficiencies contributed to
 5 the deficits and I have to say I don't think, I think it's
 6 a very complicated story because having lived with this for
 7 years, but I want to illustrate why I think the board
 8 becomes important I think that there was no doubt that the
 9 decline every year in the prediction of the GDP which we
 10 got the same problem again this year, a decline in tax
 11 morality which was not only caused by SARS but by broader
 12 levels of corruption.
 13 I know this is very anecdotal but we tried to put
 14 in an amnesty provision and the reason the amnesty didn't
 15 work as well as it should for all sorts of reasons, but one
 16 of them unquestionably was the fact that people were saying
 17 we are not going to become honest if all this money gets
 18 wasted. I mean it's a pathetic justification I accept that
 19 but it was certainly part of the reason for the failure of
 20 the amnesty. So you've got that, you've got the decline
 21 in, you've got that decline in the growth rate and it is
 22 true you also have inefficiencies in SARS. Now a board
 23 looking at these figures would be able to advise the
 24 Minister, or at least have warning signs because it could
 25 call for this evidence. It could deal with it

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1 independently and you have some independent body actually
 2 looking at these particular questions before they actually
 3 create disastrous consequences. That's what I'm saying.
 4 PROF KATZ: If I may, Advocate Steinberg.
 5 MS STEINBERG: Yes.
 6 PROF KATZ: You've happy. Leave aside
 7 now these traditional questions of governance. Just one
 8 other area that I'd like to raise with you and that's the
 9 relationship between, and I've been reading the Australian
 10 on this, the relationship between the Treasury and SARS in
 11 the following sense. Tax policy, tax drafting, tax
 12 collection. In Australia they split those three. What is
 13 your view, has your committee looked at whose involved in
 14 tax policy, then drafting to give effect to the policy and
 15 then collection.
 16 JUDGE DAVIS: It's a very good, yes of
 17 course because the, if I take tax policy the problem with
 18 tax policy is that you've got people within Treasury who
 19 deal with a lot of tax policy and rightly so. Obviously
 20 they're critical to that. There are, and there's often
 21 been tensions and you know that too because that came up
 22 even two decades ago. The tensions between Treasury policy
 23 and SARS policy and I think you have to make a call, I
 24 think you, I think you are probably inevitably going to
 25 have policy questions dealt with on both sides and I say

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1 that because Treasury obviously are in charge of the entire
 2 fiscal policy of the country and for obvious reasons
 3 therefore they've got to know about these questions. SARS
 4 on the other hand do need to be capacitated from a research
 5 point of view and a policy point of view because they see
 6 things where the rubber hits the road and I think it's a
 7 different kind of policy but it's not an unimportant part.
 8 PROF KATZ: And drafting of tax
 9 legislation?
 10 JUDGE DAVIS: Well drafting of tax has
 11 always been a problem and it's always been a problem
 12 because I think tax legislation has been so poorly drafted.
 13 Anybody who's been a Judge will know that they've struggled
 14 through all sorts of, you know sections of the act and I,
 15 my general standard view to students is that only an idiot
 16 or a genius could understand this because no normal person
 17 could and so the question is I do think we need to
 18 capacitate that. Where that lies is probably, probably
 19 something that you may want to think about, well I would
 20 have probably thought has to be in Treasury.
 21 PROF KATZ: That's the next question I
 22 wanted to ask, if I may.
 23 MS STEINBERG: Please.
 24 PROF KATZ: The Tax Ombud, do you in your
 25 experience and do you think that their functions, the

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1 demarcation of their functions is, as currently correct,
 2 should anything change on that?
 3 JUDGE DAVIS: We recommended that the Tax
 4 Ombud's role should be strengthened, quite considerably in
 5 our report and we've -
 6 PROF KATZ: Strengthened in scope or
 7 capacity?
 8 JUDGE DAVIS: Both, both because think
 9 about it. If the Tax Ombud suddenly you know got involved
 10 in the question of the VAT refunds, but I think that should
 11 have been something right up front and then if there,
 12 nobody Professor Katz, and I'm sure you know you must have
 13 had a lot of experience with this with your own clients,
 14 was nobody who was in the tax law did not know that there
 15 was some serious problems going on with VAT refunds.
 16 So the question is well why did it take so long
 17 and I do think you want the Tax Ombud to be empowered to a
 18 great extent and be able to deal with broader issues and in
 19 the sense to have the power to do so. It's a body that has
 20 worked to some extent, there's no question, so why not open
 21 it and try to make it better.
 22 COMMISSIONER: Well just on that, let's
 23 take it in relation to tax refunds, everyone knew including
 24 in SARS, so why do you need a Tax Ombud to deal with that.
 25 You need the management to deal with that.

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1 JUDGE DAVIS: Well I'm agreeing with you.
 2 That's why I -
 3 COMMISSIONER: For a thing like that, you
 4 don't need to strengthen the Ombud.
 5 JUDGE DAVIS: That is exactly why I
 6 started off my presentation to you, by saying the tragedy
 7 of all of this is everything that is coming out now was
 8 known.
 9 COMMISSIONER: Ja.
 10 JUDGE DAVIS: You didn't have to read
 11 very widely, you opened up any newspaper or the Daily
 12 Maverick or anything else and you would have known about
 13 this immediately and the question is was everybody in SARS
 14 knew about it.
 15 COMMISSIONER: Ja -
 16 JUDGE DAVIS: So I agree. Part of what
 17 our recommendations is to engender and that's why I spent
 18 so much time in the beginning trying to see, figure out how
 19 could we create a greater culture of independence given
 20 what you've just said earlier which is that we're not a
 21 society that has a long tradition of let's say public
 22 service of that kind but I do, I think that's a start with,
 23 all I'm saying is if you want a belts and braces approach
 24 you may in an imperfect world like ours want the Tax Ombud
 25 to have a greater role. That's all I'm saying.

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1 PROF KATZ: Well what greater role?
 2 COMMISSIONER: Well that's what I'm, if I
 3 can just mention, you know we've got car guards at every
 4 block here. It seems that every public enterprise needs a
 5 car guard as it were.
 6 JUDGE DAVIS: Yes.
 7 COMMISSIONER: Someone who can move in
 8 with the powers in fact that this commission has to
 9 investigate what is happening. Now whether that's the Tax
 10 Ombud's job or not I think the Tax Ombud's job is really
 11 more of dealing with the public.
 12 JUDGE DAVIS: No -
 13 COMMISSIONER: But maybe you need someone
 14 -
 15 JUDGE DAVIS: Then you need what is
 16 called inspector of taxation on the Australian route.
 17 COMMISSIONER: That's what I just -
 18 JUDGE DAVIS: Which is essentially
 19 another body that actually looks over that. But then you
 20 could, you could have a board of some sort doing that if
 21 you're incapacitated that properly. You could have a
 22 situation where you gave a board the resources to be able
 23 to move in and say we're receiving reports now. But I
 24 would want to be in a situation whereby a board would be
 25 able to have such stature that let's say a Deputy

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1 Commissioner or so many of the SARS people who spoke to me
 2 privately and who I'm not going to mention because it would
 3 be totally unfair of me to do so. Who told me things, all
 4 the stuff that has now come out, that came out in the
 5 public domain and of course weren't able to do anything
 6 about it because they feared for their jobs and probably
 7 more. Then the question is can you create a situation
 8 whereby you've got somebody where those people can go to
 9 and that, and they, proper whistle-blowing protection, a
 10 whole range of, so you're right it's not the Ombud for that
 11 particular purpose. The Ombud I suspect could be, what we
 12 were simply saying I think in our report was that we wanted
 13 the taxpaying community to have greater rights because we
 14 recommended a bill of rights, taxpayer's bill of rights
 15 which has been on the cards ever since the Katz's
 16 commission and that would be a broader form of scope for
 17 the Tax Ombud but you're right to say -
 18 COMMISSIONER: But that's where the Tax
 19 Ombud fits.
 20 JUDGE DAVIS: Ja. That's a different -
 21 COMMISSIONER: But that's not really our
 22 issue.
 23 JUDGE DAVIS: No, no I accept that. That
 24 was our issue.
 25 COMMISSIONER: Ja, alright.

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1 PROF KATZ: You don't allude, the last
 2 question I wanted to raise but you alluded to it, and you
 3 said it's very complex. Is the causation of the under-
 4 recovery, how much a bad economy, how much administrative
 5 incapacities, but what I do think that people have missed a
 6 point, the bad economy to the extent it causes, the under
 7 recoveries also cause a bad economy because you impose a
 8 VAT because of under-recovery but that then means that the
 9 retail sector, all of that's badly impacted apart from the
 10 impact on the poor and that. So there is a more, a greater
 11 relationship between under-performing tax administration
 12 causing an under-performing economy as well.
 13 [11:46] JUDGE DAVIS: Look I accept that but I
 14 would caution against the simplistic argument that the VAT
 15 increase took place only because of the SARS problem. Now
 16 it's perfectly obvious that I'm hardly the greatest
 17 advocate for the performance of SARS up to the present, so
 18 I'm not trying to be exculpatory here, but I am saying,
 19 Professor Katz, that if you've got an economy which is as
 20 tepid as ours and you've got serious kind of expenditure
 21 pressure on the other hand which one has to also look at if
 22 you're looking fiscally, it may be that we ran out of road
 23 in any event and the 1% was always lurking there. It may
 24 well be that the last year of the under-recovery tipped the
 25 balance in favour 1% but I think it's a complex set of

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1 causal questions which gave rise to the 1% tax increase.
 2 One of the things I just want to say about that is, and it
 3 really vexes one, because when you're doing a budget you
 4 see if you say well we'll get – take for example the budget
 5 for next year, how are you going to be sure that you're
 6 going to actually kind of recoup some of that recovery, if
 7 I can put it that way? How would you do that if you want
 8 to get an accurate picture without have a deficit that is
 9 too large? In other words if you say our expenditure is
 10 100 and we can collect on our present model 85 but oh well
 11 because SARS is going to be better we'll get it up to 100,
 12 that's a very, very difficult call. And so you often have
 13 to do something like a tax increase when you're in trouble.
 14 And so what's why the causal issues are so much more
 15 complicated. I do think, there's no doubt in my mind that
 16 given what no doubt you will produce and what will then be
 17 hopefully acted thereon that we will probably have less
 18 pressure on the tax side going forward. There's no doubt.
 19 And let me just say this, I know a lot has been spoken
 20 about that Bain report. We saw that report. I was utterly
 21 horrified at the time. We weren't even able to get a copy
 22 of it, they wouldn't give us a copy. So they came along
 23 and they gave us this presentation and everybody said but
 24 this is insane and then we couldn't get a copy of it so we
 25 could never comment on it properly.

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1 COMMISSIONER: Why couldn't you get a
 2 copy of it?
 3 JUDGE DAVIS: Because Mr Moyane wouldn't
 4 give us one. You have to understand, Judge Nugent, in many
 5 instances we couldn't get figures.
 6 COMMISSIONER: Well I just want to ask
 7 you about, perhaps we can come back to that if you want to
 8 –
 9 JUDGE DAVIS: I'm sorry, I'm sorry for -
 10 COMMISSIONER: But it's an important
 11 question I want to ask you, let me ask it now, if you don't
 12 mind.
 13 PROF KATZ: Ja sorry Judge, I'm finished
 14 on governance. Dennis, Judge Davis has been very helpful.
 15 COMMISSIONER: What was your relationship
 16 –
 17 JUDGE DAVIS: And by the way I'm happy to
 18 chat informally about these questions because of the amount
 19 of the time that I've lived on this particular point. If I
 20 can be of help I –
 21 PROF KATZ: You've been very helpful,
 22 Judge, thanks a lot.
 23 JUDGE DAVIS: Pleasure. Sorry, Judge
 24 Nugent.
 25 COMMISSIONER: Can you describe your

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1 relationship as the Davis Tax Committee, committee
 2 commission?
 3 JUDGE DAVIS: We were a Committee, we
 4 were never given the subpoena power that you have.
 5 COMMISSIONER: Can you give us a feeling
 6 for your relationship with the Commissioner?
 7 JUDGE DAVIS: Okay, look, we were
 8 appointed before Mr Moyane became the Commissioner at
 9 Inland Revenue. We were appointed by Pravin Gordhan, then
 10 Minister of Finance and we were to basically in a sense it
 11 had been almost 20 years since the Katz Commission reported
 12 and we were supposed to do a similar job. By the way the
 13 reason we weren't given subpoena powers was because
 14 actually nobody in their wildest dreams when we started
 15 thought that that would be necessary in any way, so it was
 16 perfectly happy to be a committee.
 17 What then occurred was Mr Moyane was appointed
 18 and initially there was not really much of a problem
 19 between ourselves and Mr Moyane and we went happily along
 20 dealing with what we had to. But matters got, I think,
 21 more and more tense because clearly the relationship
 22 between the Ministers of Finance in general and Minister
 23 Gordhan in particular and Mr Moyane started to fray, and we
 24 were actually a body giving advice to the Minister. The
 25 Commissioner immediately, it seemed to me from once they'd

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1 started, started to see us as the enemy, that somehow we
 2 were telling the Minister things and we were desperately
 3 trying to say no, our job, just like the previous
 4 commission, the Katz Commission, was there just to make the
 5 tax system better. But unfortunately what then occurred
 6 was that our relationship started to deteriorate. Then
 7 what occurred was I had taken a policy decision that I
 8 would talk to any group that asked me to publically about
 9 what my work was. So over the many years I spoke to trade
 10 union groups and business groups and various forms of NGOs
 11 and goodness knows who else. And I came, I was asked by
 12 this group of people, which seemed to be a think tank, and
 13 I think I associated with I suppose more left wing
 14 political institutions, whether I'd come and give them a
 15 report on what we were doing, which I'd done hundreds of
 16 times. When I walked into the room there I saw Mr Ivan
 17 Pillay and some of these people who clearly were not on Mr
 18 Moyane's Christmas card list and I did what I had to do, I
 19 gave my talk. And the next thing there was a report in the
 20 newspaper, not entirely accurate, but nonetheless, and I
 21 got a very rude letter from Mr Moyane basically saying how
 22 dare I've spoken to this group and how could I make all
 23 these misrepresentations about SARS?
 24 There is a battery of correspondence that I'm
 25 prepared to make available because I replied meticulously

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1 saying number 1, before you wrote to me I'd seen this
 2 article. The journalist accepted that he'd been wrong and
 3 corrected it, here is what I said, etcetera. But that was
 4 no good. From then on the next thing the various SARS'
 5 spokespeople were sort of viciously attacking me and saying
 6 I had to be removed, and at some particular point in time
 7 even suggesting that I should be reported to the Judicial
 8 Service Commission, for what I don't know, but what I'm
 9 saying is it became incredibly unpleasant, really
 10 unpleasant. What then happened, Judge was that from that
 11 moment on SARS' people in the main, one or two – and I
 12 don't want to mention names because they may feel
 13 embarrassed – were really courageous and came to our
 14 meetings and helped us, right? But in the main our
 15 information dried up. And if you look at the last amount
 16 of reports that we gave we were working now without any
 17 collaboration with SARS, none. We were advising the
 18 Minister. I was having to advise the Minister on where we
 19 should put our taxes or not but without any co-operation
 20 from SARS at all, and in fact I'd just spoken to Minister
 21 Nene because it seems to me that some of our work has not
 22 been finished and now under a new regime we can complete
 23 that work because we can get the figures and the material
 24 that is required from SARS for us to –
 25 COMMISSIONER: What regime has changed?

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1 JUDGE DAVIS: Well Mr Kingon is a lot
 2 more collaborative than –
 3 COMMISSIONER: Mr Kingon –
 4 JUDGE DAVIS: He's a very nice man.
 5 COMMISSIONER: Mr Kingon might be out of
 6 a job soon.
 7 JUDGE DAVIS: Well he might be but all
 8 I'm saying is that –
 9 COMMISSIONER: Anyway let's move on that
 10 path.
 11 JUDGE DAVIS: All I'm saying is that
 12 there, once Mr Moyane was suspended, right, it is perfectly
 13 obvious to me that people were more than happy to chat on a
 14 much more open fashion, that sort of thing. What I am
 15 saying is our relationship was, just deteriorated markedly
 16 from that moment on. There was no justification for it.
 17 Every time I got a letter – and they were lengthy letters –
 18 I responded. I asked for meetings, I asked to see Mr
 19 Moyane in order that I could explain to him that I had
 20 nothing, that whatever he did was not of interest to me,
 21 all that was of interest to me was to provide the Minister
 22 with the best possible fiscal advice that I could, and I'm
 23 afraid to say they were always left unanswered.
 24 COMMISSIONER: Can I just, you mentioned
 25 your response to the Bain report. Now Bain are here at the

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1 moment and will – perhaps it's fair to them to just say
 2 what your problems were with it so that they, if they want
 3 to they can respond to what you say.
 4 JUDGE DAVIS: The problems with Bain
 5 were, I'll tell what the problems with Bain were is that I
 6 never quite understood what the entire need for this
 7 restructuring was, that actually SARS had a pretty good
 8 mechanism, that the large business centre and that the
 9 various other components of SARS were really very, very
 10 good organisationally. All you needed to do was tinker
 11 there a little bit and we were home. What happened as a
 12 result of that was that you looked at this widespread kind
 13 of reconfiguration of SARS and ask why do you need to fix
 14 something that's not broke? And that report made no sense
 15 to me, it certainly didn't seem to me to be best
 16 international practice and it certainly didn't seem to me
 17 to be best practice given where SARS was and there were
 18 disastrous consequences. Let me give you two. Clearly,
 19 because – and you know them – because of the large business
 20 centre collapsing all sorts of problems occurred on the
 21 corporate side. But more important than that, the base
 22 erosion and profit shifting stuff. Nothing happened. I
 23 kept on being promised, when Mr Moyane and I had our last
 24 meeting – and I can't remember where it was but here it was
 25 shortly before Mr Makwakwa got suspended, I do remember

1 that. And I raised with him, and that's why I want to
 2 raise with you, I raised with him what it was and part of
 3 this is in the report that, that we were interested in two
 4 or three very significant areas, which we thought would
 5 assist greatly. One was the question of base erosion and
 6 profit shifting in the light of greater international co-
 7 operation, given the various OECD initiatives and better
 8 access to information by the tax authorities.
 9 The second was following the Mbeki report on
 10 corrupt income flows, what were we doing about that? And
 11 in particular, what were we doing about customs
 12 haemorrhaging as result of the disturbing reports that were
 13 coming out way with regard to cigarette smuggling and a
 14 whole range of other issues. Thirdly, what were we doing
 15 with high net worth individuals? Bain had raised issues in
 16 that regard but it didn't seem to me that we had to go that
 17 route, that there are ways of dealing with that. That was
 18 the third component that we were particularly interested
 19 in. And we said if you look at those three, what energy
 20 are we putting into these issues? What are we doing? And
 21 frankly nothing happened. And I don't think, when I looked
 22 at the Bain report, that I would have used it in any way,
 23 and we didn't. We certainly were given the report
 24 presented to us over three, four hours, but you'll notice
 25 that we make, the recommendations we make are completely

1 diametrically opposed to what they had. We believe ours
 2 were on best practice, they were developed as a result of
 3 very lengthy conversations I've had with international tax
 4 authorities the world over, over the last three, four years
 5 and it seemed to me quite frankly there was no need for
 6 that particular report. And I might add we did it all for
 7 about very little money.
 8 COMMISSIONER: Well that's the Judge's
 9 salary probably.
 10 JUDGE DAVIS: No I did - you're quite
 11 right, no I didn't mean that. Others were paid but – what
 12 I'm saying is it was a no brainer to us, Judge Nugent and I
 13 think that when that report was put to us, I realised we
 14 were in trouble.
 15 COMMISSIONER: Can I just say that we've
 16 heard from Bain the following. They said look, there's
 17 nothing wrong with the structure, it depends upon how it's
 18 used, in other words what people you put in, what
 19 management you've got, etcetera, so that's a managerial
 20 problem that created all the problems rather than the
 21 structure. Do you have a response to that?
 22 JUDGE DAVIS: Well let me put it this
 23 way, I'm not in any position, neither do I want to suggest
 24 any level of bad faith or anything on the part of Bain.
 25 They got it wrong, they got it wrong because people do get

1 things wrong. I think that the structure that they put in
 2 seemed to me to be (1) inappropriate and (2) not necessary.
 3 One of the great triumphs, and I'm not saying this because
 4 Professor Katz is sitting next to you but it's a fact, of
 5 the Katz Commission's report was the way in which it
 6 recommended a semi-autonomous SARS unit and SARS over 20,
 7 or let's say over 15 years thereafter structured itself to
 8 be extraordinarily, extraordinarily efficient and you only
 9 have to look at tax buoyancy rates to realise that they,
 10 why would, you want to change a structure when the tax
 11 buoyancy rates consistently were over 1. It didn't make
 12 any sense to me, it still makes no sense to me.
 13 MR KAHLA: But I'm still not getting you
 14 around what about the structure was inappropriate, because
 15 I think there's one thing around how people operate within
 16 the structure as opposed to that the structure is itself
 17 inherently flawed. And so I want to understand in what –
 18 JUDGE DAVIS: Once he starts fiddling
 19 around with things like the large business centre,
 20 etcetera, you're really asking for trouble. Just to give
 21 you a starter, right? But what I'm saying is, let me be
 22 honest, it's a long time since I've gone through that Bain
 23 report. If you gave me half an hour I'd probably be able
 24 to give you 25 things that was wrong with it. But what I'm
 25 saying is I remember, what I'm doing is I'm recollecting my

1 reaction at the time and the conversation that we had as a
 2 commission, as a committee, after we were presented with
 3 the report and why we didn't think that report was
 4 particularly appropriate.
 5 I should tell you that I spoke to the, when
 6 Pravin Gordhan returned as the Minister of Finance, we
 7 discussed this and of course he was totally on sides and I
 8 might add nobody in this country knows more about SARS than
 9 Pravin Gordhan. He was a fantastically successful
 10 Commissioner. So I was talking to somebody that, I didn't
 11 need to push the door, it was open, and his view about, and
 12 my view were exactly the same. When I went to see him I
 13 said this is the problem, he said, I agree with you. It's
 14 exactly why I'm now going to tell Mr Moyane to stop the
 15 process.
 16 COMMISSIONER: You mentioned the large
 17 business centre which is one thing but you've just touched
 18 on another which seemed to be quite central to their
 19 thinking and that is they said there was too much power in
 20 the hands of the Chief Operating Officer.
 21 JUDGE DAVIS: Mr Hall.
 22 COMMISSIONER: Mr Hall.
 23 JUDGE DAVIS: Ja.
 24 COMMISSIONER: And you earlier said well
 25 perhaps there was but you could deal with it a different

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1 way.

2 JUDGE DAVIS: Ja, I think, look, I think

3 Mr Hall was by the way a very, very efficient fellow, from

4 what I, from all reports that I received. I think the

5 answer to that would have been a quite simple question of

6 probably taking some of his portfolio away and giving it to

7 somebody else. But the problem was at the time that if you

8 were going to have a Commissioner – let me go back. One

9 could say if I pre-empt perhaps some criticism, it could be

10 levelled at what I'm about to say, would, if you've got a

11 Commissioner who knows nothing about the business, which is

12 what, in fairness, I think is common cause when Mr Moyane

13 came from correctional services to SARS, you could have,

14 you know the same accusation could be made about Mr

15 Gordhan. Those who know Mr Gordhan, of which I was one,

16 will know that he spent six months to a year, and I'm sure

17 Professor Katz had his ear bent many, many times just like

18 I did, where Mr Gordhan spent a very long time asking

19 people who he thought were the tax experts in the country,

20 what he should do about X Y Z and he tested the one against

21 the other. So when he arrived, when he, when the rubber

22 hit the road with him he was well appraised. The problem

23 here, Judge, was that to some extent you had Mr Hall who

24 really did know what he was doing and Mr Moyane who had no

25 experience of tax and then to get rid of Mr Hall and then

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1 have some structure without thinking, and one could well

2 say that's the personality issues, my argument was actually

3 with far less radical manoeuvre with one or two perhaps

4 proper appointments, everything else would have been able

5 to be perfectly fine. You certainly didn't need a massive

6 report of the kind that we were subjected to, to tell me

7 that.

8 COMMISSIONER: Thank you very much, Judge

9 Davis.

10 JUDGE DAVIS: My pleasure, pleasure.

11 MS STEINBERG: Thanks Judge Davis.

12 PROF KATZ: Thanks Judge Davis.

13 [NO FURTHER QUESTIONS – WITNESS EXCUSED]

14 MS STEINBERG: Judge, our next witness is

15 the procurement officer from Treasury. I think Mr Momoniat

16 has gone to find him.

17 [INQUIRY ADJOURNS INQUIRY RESUMES]

18 [12:05] COMMISSIONER: Good morning. Thank you

19 very much for coming to assist us. Could you just say your

20 names for the record please?

21 MR TSHITANGANO: In full my name is

22 called Mmbulahiseni Solomon Tshitangano.

23 COMMISSIONER: And will you affirm that

24 the evidence you give will be the truth, the whole truth

25 and nothing but the truth? If so will you say I do?

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1 MMBULAHISENI TSHITANGANO: I do.

2 COMMISSIONER: Thank you very much.

3 EVIDENCE OF MR TSHITANGANO

4 MS STEINBERG: Mr Tshitangano, I know

5 that Norman, the stenographer is going to ask me how to

6 spell your name and I don't know how to, so would you mind

7 just –

8 COMMISSIONER: Perhaps you could just

9 give him a note when you leave, that would help.

10 MS STEINBERG: Mr Tshitangano –

11 MR TSHITANGANO: You can just call me

12 Solly.

13 MS STEINBERG: Like my uncle. You have

14 quite a large submission to make to this Commission, I've

15 had some sight of it. Today we're really only dealing with

16 one portion of that and that's the SARS procurement of

17 Bain. We will most certainly call you back to discuss

18 other companies that were procured, but for today that's

19 our topic of discussion if that's all right with you.

20 MR TSHITANGANO: Yes it's all right.

21 MS STEINBERG: Okay. What we've

22 established so far is that with respect to the SARS

23 procurement of Bain is that there was an initial closed

24 tender in which, after a desk top exercise, SARS invited

25 six companies to tender to do the diagnostic. Four

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1 companies responded and the procurement structures

2 appointed Bain. We've established that that initial

3 diagnostic cost 3 254 000 and some cents. And that Bain

4 had given a discount of 50% on their ordinary rate. We

5 then know that two much larger contracts were awarded to

6 Bain without a competitive procurement process, but in

7 what's called a deviation. I'm aware that you have

8 documentation on this procurement process and I wonder if

9 you would start by telling us what you have in your

10 possession that might shed light on this.

11 MR TSHITANGANO: Okay thanks. The

12 documents that I have which I will submit copies, we have

13 two other files. We have documented the process from the

14 beginning when Commissioner Moyane submitted a letter to

15 the Minister of Finance. From there that was the

16 initiation of the procurement process. We have documented

17 the request for proposal, the evaluation, the adjudication,

18 but we haven't finalised the analysis of the invoices. But

19 we also have the deviation, the first deviation and the

20 second deviation. The first deviation, the 151 and then

21 you have the second deviation of the 50 million. That's

22 what I will take you through.

23 MS STEINBERG: Please go ahead.

24 MR TSHITANGANO: I don't know whether you

25 have the documents but if you – I'll start with the memo or

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1 letter that was submitted to the Minister of Finance and if
 2 you – I'll just read through the record so that you – the
 3 letter was dated 11 11 2014. He was requesting the
 4 Minister to approve the review, but what is relevant to
 5 procurement it's what I will read which is on page 2 of
 6 that letter. "To assist me in this endeavour I would like
 7 to approach independent consulting companies to assist with
 8 an analysis of the following with a view to making an
 9 enhancement in the main areas listed below." From there
 10 I'll read what he said in the recommendation. He says "I
 11 therefore request that the Minister considers the above
 12 matters and give his approval for me to approach as an
 13 initial step a number of consulting companies listed in the
 14 SARS database, our service providers to discuss the above
 15 matter with the view of enlisting proposals for a
 16 turnaround plan for SARS."
 17 From there when you read and from the procurement
 18 point of view he indicated he's going to use SARS database
 19 to identify consultants. In other words he was not going
 20 to follow a competitive bidding. He will only deviate and
 21 invite those who have identified in the database. After
 22 receiving whatever approval from the Minister what you see
 23 next it's a letter which is dated the 5th of December. That
 24 letter is written to the Chief Executive Officer Telkom SA
 25 and in that letter, just to read the purpose, it says, "to

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1 request approval of Telkom SA to participate in the
 2 contract secured by Telkom SA with Messrs Bain & Company SA
 3 for the procurement of their consulting services." Already
 4 a service provider has been identified and for you to be
 5 able to know that Bain has a contract with Telkom obviously
 6 they will have done some analysis or market research,
 7 whatever, so that they will know. But here already a
 8 letter is going to Telkom, he has already deviated from
 9 what was said in the Minister's letter because the
 10 Minister's letter says we will identify. But here we've
 11 already identified a company and that company we are going
 12 to – in terms of the processes our Treasury regulations
 13 16A6 will say if you want to participate in a contract
 14 arranged by another organ of state you write a letter to
 15 the institution that arranged the contract which is the
 16 case here. And from there you will now write a letter to
 17 the company, after receiving the approvals from both
 18 company, from the institution that arranged the contract
 19 and from the company you will decide whether you want to
 20 participate or not. The letter was signed by the
 21 Commissioner on the 5th of December 2014, but there was a
 22 space provided for the CEO of Telkom to sign which we don't
 23 have a copy that was signed. And what we don't know at
 24 this stage is whether Bain & Company was approached by SARS
 25 at that stage to request participating in the contract

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1 which they signed with Telkom because that's how
 2 participation worked.
 3 From the 5th of December up to the 10th of
 4 December we couldn't get any correspondence on this
 5 procurement. But what you will have expected to see was
 6 that because this was a deviation per se or how this
 7 participation was abandoned we don't have that information.
 8 But clearly the participation was abandoned because around
 9 the 11th of December between 9:00 and 10:00 there was what
 10 we call requests for proposal. They were sent to five
 11 companies including Bain. And when they were sent out
 12 between 9:00 and 10:00 in the morning the service providers
 13 were expected to come to attend a briefing on the 12th of
 14 December 2014. But you don't see how the five companies
 15 were identified, for example there should have been a
 16 deviation memo which would have been either prepared by
 17 users going to the relevant authority to say from our
 18 database we only identified five companies and why only
 19 five companies. And also why do you want to do this
 20 deviation because at that time, around the 11th of December
 21 most of the companies they are closing. And if you are
 22 going to run a tender during that time then you have a
 23 problem unless if you cannot postpone this tender because
 24 otherwise something will happen. Somebody is going to die
 25 then you can't postpone it then you will have to do it

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1 during that period. But otherwise it's useless to run a
 2 tender during the period that we are talking about which
 3 was the 11th.
 4 Now on the 12th of December there's a briefing
 5 session. We don't have a register of those companies who
 6 attended the session, but it's like all the five companies
 7 attended the briefing session. That briefing register is
 8 not there, we will still request SARS, maybe they will be
 9 able to locate it and give it to us. The plan was, if you
 10 look at the plan of the tender the tender it's issued on
 11 the 12th of December, it will close on the 18th of December
 12 and from there on the 19th there's going to be a
 13 presentation which was a very short notice. For the scope
 14 that was proposed there and for any potential supplier to
 15 be able to receive this document and do a proper assessment
 16 it's only very few suppliers which - if you read that SASSA
 17 CPS Constitutional Court judgment you only need what we
 18 call clever bidders who can be able to respond to that.
 19 Otherwise if you are not a clever bidder you won't be able
 20 to make it.
 21 MS STEINBERG: Mr Tshitangano, if I'm not
 22 mistaken there are Treasury regulations that specify a
 23 minimum period that has to come between the time that
 24 invitation is given and tenders are closed. Is that not
 25 correct?

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1 MR TSHITANGANO: Yes even in the
 2 documents there's some – in one of their documents they
 3 state clearly we need 21 days, but unfortunately we don't
 4 have 21 days which is the question to say even if they
 5 didn't have 21 days you can still request a shorter period.
 6 But that shorter period they will have requested it from
 7 Treasury, but if they have come to Treasury during that
 8 period they will have told them that they must advertise
 9 the tender in January, not in December. Yes.

10 MS STEINBERG: Thanks.

11 MR KAHLA: Did they come to the Treasury
 12 to ask for this deviation from the 21 days.

13 MR TSHITANGANO: No.

14 MR KAHLA: They never did.

15 MR TSHITANGANO: We never received any
 16 letter from SARS on this tender.

17 MS MASILO: Solly, you mentioned that the
 18 letter states or in the letter that was sent to the
 19 Minister it states that SARS would be using consultants in
 20 their database. Do you know if Bain was one of the
 21 companies in the SARS database?

22 MR TSHITANGANO: Yes it was in their
 23 database, I won't doubt that yes. But then on the same
 24 date there are documents from Bain which obviously we
 25 haven't asked them the questions because we are still going

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1 to ask them. The briefing was on the 12th, but what you see
 2 from the documents that were submitted by Bain all
 3 important SBD documents, standard bid documents, your SBD4,
 4 declaration of interest, your SBD1, your SBD8, your SBD9,
 5 they were completed on the 12th of December, they were
 6 signed. And what is also very strange is that on the same
 7 date, on the 12th, in the SBD document there is a price
 8 already included. And you could only do that if you have
 9 already been briefed and after being briefed then you still
 10 go and work on the documents. But otherwise my suspicion
 11 for me is that either through the participation that may
 12 have been abandoned Bain may have been approached and they
 13 were aware of this scope and then they started preparing
 14 which obviously becomes unfair because other people will
 15 have only been exposed to the information from the 11th.
 16 And if Bain was exposed to this information before that
 17 then it becomes a problem. But we are still going to ask
 18 them that question and whether they were having. But
 19 otherwise the documents they signed on the 4th indicates
 20 price already 4.7 they give SARS discount of 50% and now
 21 the price comes to 2.3 it was before including VAT. Even
 22 the letter that they wrote responding to the proposal,
 23 there's a letter that is written, the date is there 12 and
 24 it refers to the request that they received on the 11th and
 25 they outline all the things. I'll refer you to that letter

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1 because I have also a copy of that letter. But if you look
 2 at the internal engagements between the officials in SARS,
 3 there was a problem also from the correspondences from the
 4 MS that we will give you because some members of the BEC,
 5 Bid Evaluation Committee, were not available during that
 6 time. Then the questions that were being asked do we
 7 continue with to close the bid on the 18th or do we extend
 8 the closing date to January because then by that time even
 9 BEC members will be back.

10 I remember in one email the response was that
 11 even there are three BEC members let's continue. But after
 12 it has closed we tried to check the minutes whether -
 13 because the presentation was supposed to be done on the
 14 19th. We are still waiting for those documents whether the
 15 presentations were done on the 19th because we don't have a
 16 register. But if the presentations were done on the 19th
 17 how many members were there because presentation was having
 18 30 points for example.

19 [12:25] All evaluators should have scored. But from the
 20 19th you only see as signatures of BEC members from around
 21 the 20th, 16th and the 21st of January. But to clearly
 22 indicate there was no emergency here. I'm saying those
 23 five days that you will have requested if there was an
 24 emergency and somebody was going to die before January then
 25 obviously we, if it was an oncology equipment like in KZN

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1 if you were aware obviously we will allow them to do that.
 2 But here I don't see why this was regarded as an emergency.

3 Then the evaluation, if you look at the
 4 evaluation the evaluation, the dates that you see is the
 5 20th and the 21st of January. The tender is evaluated and
 6 it's finalised. But what – when you read the minutes
 7 normally the minutes should indicate the tender was
 8 evaluated from what time to what time but if you check the
 9 documents that are here you see signatures on the 21st and I
 10 don't know at what time were they finalising this course on
 11 the 21st of January. But when you check there's a BAC
 12 meeting at 2 o'clock the same team that was finalising the
 13 evaluation if you check it at the minutes it's also in
 14 attendance of that meeting. The point I'm raising is that
 15 if you are going to a BAC meeting and you want to
 16 adjudicate a tender properly you should have been given
 17 documents, you should have read the documents so that you
 18 will be able to participate in that meeting and adjudicate
 19 a tender properly. But this one is starting at 2 and
 20 there's other signatures that are there earlier. I don't
 21 know what time they started but there's something that we
 22 will find out from the committee, what happened.

23 I just want to go to this page where so that I
 24 can put this on record and the fact that I'm going to give
 25 you the minutes of EXCO requirement sub-committee, that's

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1 on page 205 which I'll hand over the file. Their meeting
 2 is on the 21st of January 2015, starting at 14 hours. In
 3 that meeting there are red flags that are raised in that
 4 meeting which I will also put them on record, but even with
 5 those red flags that are raised by, in that meeting at the
 6 end of the meeting the BAC is approving the recommendation
 7 of the BAC. One of the issues or flags which it's raised,
 8 I'll skip, I'll only raise the important one, why do we do
 9 a closed tender? It's the question that is raised in the
 10 BAC meeting and then the answer, timing was of essence.
 11 How were the companies invited for a closed tender chosen?
 12 They were selected from an appointed panel of consultant
 13 for the specific service required. Why was Accenture and
 14 BBND not invited? Because they are not on our consultancy
 15 panel. But IT service providers and if you remember what I
 16 said, I read from the Minister's letter it says SARS
 17 database. He never talked about a panel.
 18 There was a withdrawal from PWC because of the
 19 time. It would get a better understanding from them. They
 20 said expecting a delivery in six months is not practical.
 21 That's how, that's why they withdraw their application. A
 22 question was asked whether the appointed BAC members were
 23 experts in the field or not. Some of them are and some
 24 not. They were chosen randomly. These are questions and
 25 they're answered in the same meeting. What would be the

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1 deliverable for this consulting service? This should be
 2 very shocking because you see when any tender in terms of
 3 the legislation you must have what we call a specification
 4 committee that will develop the specs that is not biased
 5 and this and this. The specification would have been
 6 approved by a certain delegated committee or individual and
 7 that is that spec that would have been sent. That spec
 8 will have been seen by BEC members or BAC members. In
 9 other words you will not go to a BAC meeting where you are
 10 still going to ask a question like this. I'm just giving
 11 you an example but they were still asking these questions
 12 to say but when are they going to deliver these people? It
 13 will be recommendations from the service provider. That is
 14 the answer, on how to improve our strategy by comparing us
 15 to other government departments.
 16 The other question, did the BEC consider advisory
 17 and implementation as phase 1 and 2 to be done by the same
 18 service provider? Yes, they did but concluded by saying
 19 they will appoint consultants to do advisory and at a later
 20 stage go to market, we must underline, go to market again
 21 to appoint a service provider to implement. The other
 22 reason is that they needed to know what is to be
 23 implemented first, which would be addressed by their report
 24 from the consultants appointed for advisory phase. It was
 25 also mentioned that the idea is that the appointed service

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1 provider must give recommendations that can be implemented
 2 by any service provider, not them alone.
 3 COMMISSIONER: May I just – who is giving
 4 the answers there?
 5 MR TSHITANGANO: The BAC was sitting
 6 there, presenting –
 7 COMMISSIONER: Alright.
 8 MR TSHITANGANO: - but the minutes don't
 9 write to say who was, but I believe those who were in the
 10 meeting, the BAC members and the BEC members maybe they
 11 were assisting but otherwise most of the answers would've
 12 come from BEC members because they are the ones who
 13 evaluated. But these questions are asked in a BAC meeting
 14 and they answered they and if I was part of that BAC I
 15 would've thought no, otherwise we must start the process
 16 afresh. We don't know what we want. Then the decision
 17 that follows those questions and answers approved as per
 18 BEC recommendation. Reason for the decision the BEC
 19 recommendation it's only for the reviewing and aligning
 20 phase and later from the findings we will move to the
 21 implementation phase. It's very clear that, I'm saying
 22 from this decision they were going to appoint Bain to come
 23 with a strategy why design or whatever but that strategy or
 24 the design was still going to be subjected to competitive
 25 bidding for implementation.

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1 That's what was approved and the implementation
 2 of the, in other words which was 3.5, they should've given
 3 the report, after the report there should've been
 4 competitive bidding. Now if you look, even though I
 5 summarise the process from the memo or the letter to the
 6 Minister up to the BAC obviously you can see the process,
 7 the process was not done properly. The process was not
 8 done properly and you cannot say the company was properly
 9 appointed. A number of red flags were raised there and
 10 which result in irregular appointment.
 11 Then one thing that after they finalised the
 12 report they were paid, we are still analysing the payments
 13 because what was very strange if you look at the number 2
 14 company which it's McKinsey, I'm saying in terms of this
 15 proposal, number 2 was McKinsey at 2.8 million and Bain was
 16 2.7 million but after they've given SARS a 50% discount
 17 which may mean that even the rates that they were given us
 18 were inflated because how do you give the government a 50%
 19 discount like that but we'll still need to look at that
 20 one.
 21 MR KAHLA: Are you saying that is unusual
 22 for tenderers to give government 50% upfront in terms of
 23 discount?
 24 MR TSHITANGANO: Ja, that's unusual. I'm
 25 saying from the reviews that we've done, we've done so many

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1 reviews, even other suppliers well they will say ja, these
 2 prices are reasonable. You'll find that they still have
 3 added even their profit, their mark-up and other
 4 commissions that they paid to other people, yes.
 5 PROF KATZ: Sorry, so just to follow up
 6 Mr Kahla's question, are you saying that the 50% was
 7 designed to bring it below McKinsey?
 8 MR TSHITANGANO: That may be a suspicion
 9 but remember at this stage, because I don't have the facts.
 10 The suspicion, my suspicion is that for you to be able to
 11 give a document with a price on the 12th after attending a
 12 briefing you should've started some time back and that we
 13 know is a problem with government. That's why from 2016 if
 14 you check the way we do it, because we were knowing that
 15 there is some government officials who will give
 16 information to other suppliers so that they start preparing
 17 and they advertise a tender for 24 hours because a 100
 18 million tender for 24 hours because those that they want to
 19 get this and they were given three weeks back documents and
 20 then from 2016 then we said all bid opportunities we
 21 advertise them quarterly if you check the National Treasury
 22 website, we advertise so that you will decide and what I
 23 didn't even mention there is that all government
 24 institution they submit procurement plans to us and in the
 25 procurement plan of SARS this was not, it was not there.

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1 In the procurement plan which was submitted in June it was
 2 not there as a project. It was not there as a project.
 3 Because when you according to our requirement you submit
 4 your procurement plan during that period 2014 it was the
 5 end of April each year. But which we later changed because
 6 now they submit the 31st of March each year but in the
 7 original plan it was not there.
 8 COMMISSIONER: What is the purpose of
 9 submitting the plan? Certainly submitting, disclosing the
 10 plan –
 11 MR TSHITANGANO: You remember the, in
 12 terms of government planning, when you submit your budget
 13 for approval they submit what we call APP, annual
 14 performance plan, that goes to parliament. Ensuring that
 15 with the budget that I was given this is what I'm going to
 16 do and then as us procurement office now we says, okay now
 17 that you know you're going to do 1, 2, 3. We need to know
 18 when are you going to advertise this tender so that you can
 19 render this service. Because if you don't do that they
 20 will just sit and you find that a service that must be
 21 rendered in June is going to be rendered in March or
 22 December, but then you are able to control yourself
 23 delivery because you will say I will advertise this tender
 24 in April. I will evaluate it. In June I've appointed a
 25 supplier, the supplier's going to start his service. The

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1 procurement plan help us to monitor you whether you are
 2 going to deliver or not. We will check whether have you
 3 advertised your tender as in your plan. Have you
 4 evaluated, have you educated, when are you starting.
 5 Around 2015/16 I remember because we used to even
 6 to put the name of the accounting officers when we publish.
 7 They used to complain because suppliers now potential
 8 suppliers who were looking at this, what we published, they
 9 checked but your department was supposed to advertise this
 10 tender. This tender is not here. They phone the
 11 accounting officer, the accounting officers were saying no
 12 remove our names. I said no, no, no, but you promised
 13 them. It's transparency. Therefore you, I'm saying that
 14 is the purpose.
 15 MS MASILO: Since – I mean the new
 16 Commissioner came into SARS in September so it was past the
 17 date on which the procurement plan for 2014 was submitted
 18 to SARS. Was he supposed to have submitted his new
 19 procurement plan as the new accounting officer before he
 20 could engage in procurement of this nature?
 21 MR TSHITANGANO: Yes, they should have
 22 amended their procurement plan and you remember whatever
 23 you put in the procurement plan there's budget allocated to
 24 it and a project like this we just came around November,
 25 December unless if there were serving because they were

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1 supposed to in fact where they were going to get the money
 2 to do this new project which is coming now and obviously
 3 you need again to say from November to the end of the
 4 financial year was it going to be too late if you're going
 5 to budget for this project in the new financial year. I'm
 6 saying those were the issues that we were going to look if
 7 they submitted to us. But I wanted to conclude this part
 8 with, now Bain completed and they must test the market and
 9 now their story is changing. It's no longer going to be
 10 possible to test the market now. It's a document which I
 11 will submit is called inter-office memorandum, request for
 12 approval for deviation from procurement process in terms of
 13 Treasury regulation 16(a)6.4 for consultancy service, SARS
 14 operating model review phase 4. And Treasury regulation
 15 16(a)6.4 for the record it's only allowing accounting
 16 officers and authorities to procure without advertising a
 17 bid in emergency cases and sole supplier cases only. There
 18 are other cases if you want to depart then you'll have to
 19 motivate and Treasury will have but 16(a)6.4 that is quoted
 20 here it's only emergency and sole supplier and Bain was not
 21 a sole supplier and there's no facts that are given here
 22 from the records that I've seen which says this was an
 23 emergency. Then he says in February 2015 enquiries were
 24 received about the sourcing needs for phase 2 of the
 25 project. Procurement prepared to go out on tender. Upon

<p style="text-align: right;">Page 2058</p> <p>1 further deliberations the requester highlighted the 2 following risks with an open tender process. 3 [12:45] 1, the process takes too long and will not cater 4 for the urgency of starting with phase 2. The openness of 5 the tender process will compromise sensitive and 6 confidential information. There's no assurance of 7 continuity from phase 1 to phase 2 of the project. This 8 contradicts what I read to you which is in their records, 9 we have seen SARS records which is very clearly, we are 10 appointing but what is going to happen? But now the 11 decision is changed and Bain is again appointed on 12 deviation, 151 million. 13 And the problem with only allowing one proposal 14 in the absence of any competition the supplier will charge 15 any amount, and because you don't have any way of checking 16 the reasonableness of 151 you will just accept it and they 17 will still say like I've seen because later after they've 18 spent the 151 million and point 3, the project was supposed 19 to be finalised and they said if we don't pay the 50 20 million for finalising this project it means we are going 21 to incur fruitless and wasteful expenditure. And they 22 brought that to Treasury, Treasury agreed but obviously we 23 didn't even have the background information that we have 24 now. We would not even have said yes, we would have said 25 no, otherwise just recover whatever you need to recover.</p>	<p style="text-align: right;">Page 2060</p> <p>1 MR KAHLA: But does that phase 3 indicate 2 that it is to conclude an implementation? The reason I'm 3 asking is that I understand Bain was not involved in the 4 implementation, the implementation fell somewhere else. 5 MR TSHITANGANO: Ja, I'll check you the 6 way the letter reads but it's - 7 PROF KATZ: I'm battling, sorry. 8 COMMISSIONER: What happened to phase 2 9 though? 10 MR TSHITANGANO: The phase 2 - 11 COMMISSIONER: You read to us from phase 12 2. 13 MR TSHITANGANO: Yes. 14 COMMISSIONER: Was that approved by 15 Treasury? 16 MR TSHITANGANO: No. 17 COMMISSIONER: Well how, what did 18 Treasury do about it? Did they receive that deviation 19 application? 20 MR TSHITANGANO: The first one was to 21 develop a strategy which was phase 1 for 3.2 or million. 22 Then there was phase 2 of the project which is the one that 23 I was reading you. 24 COMMISSIONER: But that, you're reading 25 from an application for a deviation letter?</p>
<p style="text-align: right;">Page 2059</p> <p>1 But otherwise in short that's what happened with the 2 procurement process which resulted in the appointment of 3 Bain & Company. 4 MR KAHLA: So the second deviation was 5 approved by the National Treasury? 6 MR TSHITANGANO: No, that side 1, to 7 file, to conclude now. The 151 is this one which did 8 additional project and then later, phase 1 and phase 2. 9 Now we need to conclude with phase 3 and we can't conclude 10 if we don't appoint them again for 50 million. That was 11 the third phase. 12 MR KAHLA: That third phase is it 13 connected to the second phase? So from what they are 14 saying this third phase is to complete what is coming out 15 from phase 2? 16 MR TSHITANGANO: Correct. It is the 17 finalisation then. The reason that is given is what I'm 18 telling you because if you start a project and you are 19 about to complete and you don't complete it you say ja, I 20 incurred fruitless and wasteful expenditure because 21 Treasury didn't allow me to complete, like what the others 22 will say. But the 50 million was now to conclude the 23 implementation which I'm still going to check to say what 24 is that because even after they've done that, we have 25 received a report, I think after, it was yesterday, ja.</p>	<p style="text-align: right;">Page 2061</p> <p>1 MR TSHITANGANO: Ja, but their own 2 internal division. It was not coming to Treasury this one. 3 COMMISSIONER: That didn't come to 4 Treasury at all? 5 MR TSHITANGANO: No, no, no. 6 MR KAHLA: And it wasn't supposed to? Or 7 was it supposed to? 8 MR TSHITANGANO: I'll say - 9 MR KAHLA: I'm asking in terms of the 10 rules. 11 MR TSHITANGANO: In terms of the rule, 12 I'm saying the motivation that is used here they were still 13 saying it's emergency. They were using 6A64 as emergency. 14 Therefore because the justification was emergency you will 15 not come to Treasury. It's only that when you look at it 16 now your AG or you are Treasury when you analyse it which 17 says okay was there any emergency here? But the 18 justification that was used here it was 6A64 emergency 19 which is approved by the institution itself. 20 MR KAHLA: So in relation to both 21 emergencies and sole supplier deviations it is the 22 institution that makes that approval not the Treasury? 23 MR TSHITANGANO: Emergency and sole 24 supplier, you, yes. You approve and your only obligation 25 is to just to report to AG and National Treasury.</p>

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1 PROF KATZ: But what you're saying it
 2 presupposes that it was an emergency or a sole supplier, in
 3 other words if it's not an emergency or a sole supplier
 4 then it's got to go to Treasury. The only way they can use
 5 6A4 if in fact there was an emergency.
 6 MR TSHITANGANO: Correct. Correct.
 7 PROF KATZ: Or a sole supplier.
 8 MR TSHITANGANO: Yes. In the absence of
 9 that they will have come to Treasury in terms of section 79
 10 of the PFMA because it's a departure from the Treasury
 11 regulations or any other Act. When they came to us, I'll
 12 indicate because in May 2016 after we have seen that
 13 there's a lot of abuse and we wanted now to have an idea
 14 who's buying through single sourcing. In other words
 15 single sourcing, there are so many suppliers that are there
 16 but I only prefer only Solly and you only go to Solly and
 17 you procure. From 1 May 2016 which says no, all single
 18 sourcing, if you want to buy through single sourcing you
 19 must come to Treasury. That's where they came to Treasury.
 20 They realised that this is not emergency, they can't do it
 21 on their own, that's why they came to Treasury, third
 22 phase.
 23 COMMISSIONER: Does the second – perhaps
 24 Ms Steinberg can help me as well because I think we raised
 25 this. Does the second application for phase 2, does it say

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1 anything about the price or the rate rather the rate at
 2 which it's going to be, the service will be provided?
 3 MR TSHITANGANO: Ja.
 4 COMMISSIONER: What does it say about the
 5 rate?
 6 MR TSHITANGANO: Let me see where they
 7 talk about the amount. Financial implications, the
 8 proposed fees by Bain are as follows, Bain cost before
 9 12.2% discount. Then you have total, 136.2 million. To
 10 have 2A, 2B, 2C. 2A is 32.2, 81 million, 23 million and
 11 then it has got options. You have option 1 which is 12
 12 months support. For phase 2, from April 2015 to May 2015.
 13 But the total which is included is 151 870 million.
 14 COMMISSIONER: May I look at that
 15 document, please? Thank you. But the rate here is not of
 16 course the rate less 50%.
 17 MR TSHITANGANO: When you read then, it
 18 talks about 12.2.
 19 COMMISSIONER: Ja, so -
 20 PROF KATZ: Sorry Judge.
 21 COMMISSIONER: If my calculation is
 22 correct that would have been far above the rate of
 23 Makenzie. Anyway we can calculate.
 24 MR KAHLA: But isn't that a different?
 25 MR TSHITANGANO: This is a different, you

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1 remember it's a follow up project which according to the
 2 minutes of the BAC of the 21st January 2015 they should
 3 have, Bain should have given SARS a strategy.
 4 COMMISSIONER: Yes.
 5 MR TSHITANGANO: Then when they received
 6 the strategy they were supposed to invite consultants to
 7 say I want you to implement the strategy. Like if I have a
 8 building plan, it does not mean that the one who produced
 9 my building plan is going to build my house.
 10 COMMISSIONER: Ja, no I understand.
 11 MR TSHITANGANO: After I receive the
 12 building plan I can go to build various contractors and say
 13 how much are you going to cost me to build this house? The
 14 other one say R1.00, 500, that's what should have happened
 15 but it didn't happen here.
 16 COMMISSIONER: But so you are saying on
 17 this one though there was no competitive bid at all? So we
 18 don't know what anyone else, Makenzie –
 19 MR TSHITANGANO: Correct, correct.
 20 COMMISSIONER: Ja. There's another
 21 document though.
 22 MS STEINBERG: Yes, I've got the document
 23 that you're recalling. This is called "Request for
 24 deviation from procurement processes in terms of Treasury
 25 regulation 16A6.4". It's the 19th August 2016. And so this

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1 document –
 2 MR TSHITANGANO: This is not. This one
 3 is the 15 April 2015. The one that you have is the 50
 4 million. This is the 151 million.
 5 MS STEINBERG: Yes, there are two points
 6 that I want to make here. The first is that this document
 7 is submitted after the 50 million but the second point is
 8 what the Judge is getting at, that what this says is that
 9 the service provider's rates were the cheapest in the
 10 competitive process run by SARS to appoint a consulting
 11 company to advise SARS operating model review. Now that is
 12 a misrepresentation because the service provider's rates in
 13 that closed bid were not the cheapest. They were in fact
 14 almost double the next most expensive. They only paid less
 15 because of the 50% discount. Do you follow what I'm
 16 saying?
 17 MR TSHITANGANO: Yes I follow, yes.
 18 MS STEINBERG: So what I'm saying is that
 19 this is a material misrepresentation because actually the
 20 rates were not the cheapest, they were the most expensive,
 21 even with the 12% discount.
 22 MR TSHITANGANO: The initial one was the
 23 50% discount.
 24 MS STEINBERG: Yes, but I'm saying this
 25 says the service provider's rates were the cheapest in the

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1 first round but they were not. They were, the actual rate
 2 was discounted by 50%. Going forward it was the rate
 3 discounted by 12%.
 4 MR TSHITANGANO: Correct. I agree fully
 5 with you because if you, that document that I give you,
 6 they were having individuals and those individuals were
 7 having a rate per hour, which after they've done all their
 8 totals they cut them by 50%. But if later you use the same
 9 rates and you cut them by 12, obviously then it's something
 10 else.
 11 MS STEINBERG: That's exactly what I'm
 12 saying.
 13 MR KAHLA: Sorry, let me understand
 14 something.
 15 MS STEINBERG: Yes.
 16 COMMISSIONER: Could we just see the
 17 document for a moment?
 18 MR KAHLA: You have, in the first phase
 19 where there is the fee that's proposed and the discount is
 20 that in the same proposal that effectively a case of saying
 21 I would have charged you X amount but I actually will
 22 charge you X amount minus 50%.
 23 MS STEINBERG: Yes exactly.
 24 MR KAHLA: So that's the proposal.
 25 PROF KATZ: Sorry can I just -

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1 MS STEINBERG: Exactly. In other words,
 2 in other words -
 3 COMMISSIONER: That's the competitive
 4 bid.
 5 MS STEINBERG: That's the competitive
 6 bid.
 7 MR TSHITANGANO: That was the competitive
 8 bid.
 9 MS STEINBERG: And it says, Mr Kahla, it
 10 says, "Our rate is X".
 11 COMMISSIONER: The service provider's
 12 rates were the cheapest in the competitive bid process but
 13 in fact they were double, the rate was. It only came down
 14 because of the discount.
 15 MR KAHLA: But what really, I'm trying to
 16 understand what turns on this. I indicate to you I'm going
 17 to charge you R10.00 for a particular service. Rather than
 18 I assess that this service requires that I charge you
 19 R10.00 but I will charge you R5.00.
 20 MS STEINBERG: Yes.
 21 MR KAHLA: Is that not what exactly
 22 happened? Or was this 50% coming after the valuation or
 23 was it effectively a part of the proposal? I would do you
 24 this work for R10.00 but because of I want to get into this
 25 space, I've elected to do it for R5.00.

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1 MS STEINBERG: Correct.
 2 MR KAHLA: Is this what happened?
 3 MS STEINBERG: Correct.
 4 PROF KATZ: But on that point, is it
 5 normal Mr Tshitangano, assume that there is a phase 1 and
 6 there is going to be a phase 2, shouldn't you be saying I
 7 tender this for phase 1 and if I'm awarded phase 2 I'll do
 8 this, so that when you evaluate it, you know everything.
 9 MR TSHITANGANO: There you are correct
 10 depending, what was asked in the BAC? The BAC could sense
 11 that you don't need to separate phase 1 and phase 2. This
 12 should have been done as one tender.
 13 PROF KATZ: Yes.
 14 MR TSHITANGANO: That's why that question
 15 in the BAC to say but the BAC said no, don't worry, we are
 16 not combining the two, we will, we are only, we want only
 17 the strategy and after receiving the strategy we are still
 18 going to do, to go to the market and that's what is in the
 19 record and that's how the BAC approved. The BAC approved
 20 because there was going to be a competitive bidding after
 21 receiving the strategy. Now the question is if the BAC now
 22 approved the second one, why did they approve it? I'm
 23 saying they can answer themselves.
 24 MS STEINBERG: Yes, notwithstanding the
 25 third one. But Professor Katz, I think there were two ways

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1 to skin this cat. The first way is to say bid upfront for
 2 everything. Now there's a second way because it is, it
 3 could be argued that you don't know what to bid for in
 4 terms of implementation until you have a diagnosis, till
 5 you know what you're going to implement. Now there are,
 6 there are many tenders, and perhaps you can confirm this
 7 where there's an initial short phase, which is often a
 8 request for information, an initial analysis that's done,
 9 the building plan and then based on that specs are drawn up
 10 based precisely on that diagnostic. Specs are drawn up and
 11 taken to market and that initial bidder along with anybody
 12 else can then bid for phase 2.
 13 MR TSHITANGANO: Correct.
 14 MR KAHLA: I need some clarity again. In
 15 relation to, we've dealt with phase 1 and the deviation,
 16 well the competition there. Then we get to phase 2, the
 17 deviation. We move to phase 3, another deviation, which
 18 then gets raised with the Treasury. But I want to
 19 understand is the work to be done in phase 3 important for
 20 the completion of phase 2, because the indication I get is
 21 that, is that the same work or is it, is that a different
 22 assignment?
 23 MS STEINBERG: What the document tells us
 24 is that phase 3 is the special customs and excise carve-
 25 out.

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1 MR KAHLA: But that's a different –
 2 MS STEINBERG: Yes.
 3 MR KAHLA: But not the, that's not the
 4 operating model work. So to suggest that you can't
 5 complete phase 2 without phase 3, that would be a
 6 misrepresentation.
 7 MS STEINBERG: Yes I would agree with
 8 that.
 9 PROF KATZ: Ja, that's what I've been
 10 battling with as well.
 11 COMMISSIONER: But then there's also the
 12 problem that for phase 3, the service provider's rates were
 13 the cheapest in the, but in fact they weren't. And then
 14 they go on to say the 12.2% discount offered to SARS by the
 15 service provider in the original contract has again been
 16 given. So on this occasion a 12½% discount is given. The
 17 rate remains the same. The first time they got under the
 18 second bidder by halving it and then when they do the work
 19 they take off 12% only.
 20 MS STEINBERG: Yes. Mr Tshitangano, is
 21 there anything else in that big pack of yours?
 22 MR TSHITANGANO: No I just give you that
 23 because otherwise, you'll have the rates as they are
 24 indicated to say –
 25 COMMISSIONER: Thank you.

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1 MR TSHITANGANO: This person is this rate
 2 and then all the rule, SBD document signed earlier. We are
 3 just going to give you the pack so that if you don't have.
 4 COMMISSIONER: Are you going to leave us
 5 with all of those documents?
 6 MR TSHITANGANO: Yes.
 7 COMMISSIONER: Thank you.
 8 MS STEINBERG: We're very grateful for
 9 this. It's shed a lot of light on it and we'd be grateful
 10 for the same examination of the other tenders that you've
 11 earmarked over this period, which we'll look at, at a later
 12 stage.
 13 MR TSHITANGANO: Thanks.
 14 MS STEINBERG: Thank you very much.
 15 COMMISSIONER: Thank you very much, it
 16 has been very, very helpful.
 17 [NO FURTHER QUESTIONS – WITNESS EXCUSED]
 18 [13:05] MS STEINBERG: Judge, after lunch Bain
 19 will return to wrap that up.
 20 COMMISSIONER: Well have they been
 21 alerted to now and seen these documents? Is Bain -
 22 MS STEINBERG: I did see Ms Moodley -
 23 COMMISSIONER: She's here, oh just -
 24 MS STEINBERG: Mr Massone.
 25 COMMISSIONER: Mr Massone, if you want to

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1 look at these documents over lunch time feel free to do so.
 2 Is that okay? Right what time? 2 o'clock.
 3 MS STEINBERG: 2 o'clock.
 4 COMMISSIONER: Thank you.
 5 [INQUIRY ADJOURNS INQUIRY RESUMES]
 6 [14:12] COMMISSIONER: Good afternoon, Mr
 7 Massone.
 8 MR MASSONE: Afternoon.
 9 COMMISSIONER: Sorry to have kept you
 10 waiting but thank you.
 11 MR MASSONE: Thank you.
 12 MS STEINBERG: Hi, good afternoon.
 13 MR MASSONE: Afternoon.
 14 MS STEINBERG: Just to remind you, you're
 15 still under oath.
 16 MR MASSONE: Yes.
 17 **EVIDENCE BY MR MASSONE**
 18 MS STEINBERG: We'd like to discuss the
 19 large business centre next. In your diagnostic summary,
 20 this is page 5 of the first submission that you gave us.
 21 MR MASSONE: Okay.
 22 MS STEINBERG: There are a few things
 23 that Bain diagnosed with regard to the LBC. "SARS
 24 interviews indicated that the LBC did not have the tools
 25 resources and capabilities to tackle BEPS. There was an

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1 opportunity to increase specialised resources dedicated to
 2 priority segments. For example SARS has four auditors
 3 dedicated to high net worth individuals within the LBC.
 4 SARS data shows that 85% of LBC debt is disputed and mostly
 5 suspended preventing the application of the pay now argue
 6 later policy". I think those were the main points. And
 7 then on slide 74 there are diagnostic findings together
 8 with proposed design solutions which are really the
 9 assigned chief officer for BAIT to be "a single point of
 10 accountability for SARS, segregated case selection
 11 function, an audit function, combined accountability for
 12 the tax register, combined accountability for service
 13 channels, again under the CO" etcetera, etcetera.
 14 I think it's beyond dispute now that the large
 15 business function of SARS has fallen apart in the last
 16 couple of years subsequent to the new operating model and
 17 we're trying to understand what happened. There's a
 18 certain mystery here because nobody ever said that the
 19 large business centre was going to go. Yet it did and I'd
 20 like to understand more clearly what it is that Bain
 21 proposed with regard to the large business centre.
 22 MR MASSONE: Yes. So maybe I – shall I
 23 speak or use slides, I think let's start to speak and then
 24 -
 25 MS STEINBERG: Okay.

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1 MR MASSONE: - if I need a slide, should
 2 I do – but the idea was to actually strengthen it and so
 3 elevating it to a chief officer's position. So with full
 4 participation to the executive committee. On the
 5 capability side there was the idea of increasing the number
 6 of auditors, increasing the skills and the capabilities and
 7 then to separate the enforcement from the case selection.
 8 The case selection will be remaining in the LBC together
 9 with the, let's call it taxpayer's strategy so
 10 understanding a segment of services and accountability for
 11 the relationships. So the single point of a relationship
 12 with the large corporates and separating it from the audit
 13 and enforcement. This was in summary the recommendation.
 14 This last point were the things we discussed yesterday
 15 about separating these two important phases of the process.
 16 MS STEINBERG: Now I'm puzzled about
 17 that, the need to separate enforcement for two reasons
 18 really. The one is that the model was an end to end model
 19 and it did include enforcement and we can debate about how
 20 well it was working but the fact remains that since the
 21 time it was established it had grown from strength to
 22 strength and was responsible for 30% of the revenue
 23 collection and was acknowledged worldwide as a high
 24 functioning large business centre. So I'm puzzled all in
 25 all as Judge Davis put it, I'm puzzled that one tried to

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1 fix what wasn't broken and by fix I mean start separating
 2 functions out. Specifically with regard to enforcement. I
 3 tell you what puzzles me, Mr Massone, is that there's a
 4 slide here that you include in your presentation which
 5 shows the operation of large business units all over the
 6 world. I'm not sure where I put it. And what it shows is
 7 that in some countries, including the US and Canada for
 8 example, the large business centre does have its own
 9 enforcement capacity. So in some countries it's split and
 10 in some countries it isn't. So one can't even say that
 11 best practice is to take the enforcement unit out, to
 12 separate and break up the LBC the way we saw. It's not,
 13 it's different all over the world. Why was it necessary to
 14 start taking apart this LBC that was functioning so well?
 15 MR MASSONE: Necessary, it wasn't
 16 necessary. We saw some opportunity to improve it on the
 17 strengthening we said but also in the creating more checks
 18 and balances. And if I may, given what we said yesterday
 19 about what happened afterwards in terms of concentration of
 20 power, if enforcement hadn't been separated you would've
 21 ended up with something that was even bigger than what it
 22 was before. I know this is not the question you are asking
 23 but I'm saying I think luckily enforcement was separated
 24 because at least some, one of the function was segregated
 25 from the remaining part of the BAIT. But anyway it was

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1 necessary, it was an opportunity from a strengthening
 2 perspective and an additional focus on the taxpayer and the
 3 separation from enforcement. Like I said yesterday I
 4 accept what you said about what happened afterwards. It is
 5 a question of the people you appoint there, the experience
 6 they have, the seniority they have and the capabilities
 7 they have. But more importantly in this case of a
 8 separation if you can do, if you can recreate those
 9 connectivities that can process end to end even if the two
 10 units are separate. I mentioned yesterday the example of
 11 the banks that do that particularly well of the front end
 12 that serves the customers and speaks about the products in
 13 this case and the risk management there is, makes the
 14 decision, the risk allocation and the balance between the
 15 two creates the best outcome for the client and for the
 16 institution. So my only point is it wasn't necessary, it
 17 was an opportunity. The consequences are not to be, in my
 18 opinion of course, to be related to the change in structure
 19 but in execution of it. In particular on what I said, if –
 20 yes -
 21 MS STEINBERG: Okay I think we're going
 22 over old ground here and we needn't. You know, from my
 23 perspective it's that I don't, I still do not understand
 24 why you make deep structural changes to a unit that's
 25 working so well and impose them that quickly. And that

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1 structure that you recommend might work somewhere, in
 2 theory it might be good, in New Zealand it might be good,
 3 but we have something that was working well here and I
 4 simply do not understand the case for change.
 5 COMMISSIONER: Sorry, and I'll tell you
 6 what concerns me a bit. Everyone we've heard complains
 7 about the breaking up of the large business centre. The
 8 Institute of Chartered Accountants, I think it was them,
 9 came and gave evidence and they were complaining bitterly
 10 about it. The Institute of Tax Practitioners representing
 11 all the tax practitioners in the country, exactly the same.
 12 Everyone – I have heard not one person, I don't think, I
 13 can't recall, having been critical of the LBC. All of them
 14 say please put it together again and that's what worries me
 15 when you say well we thought it, you know, a good idea to
 16 take this out, etcetera. Did you speak to the Institute
 17 of, the South African Institute of Chartered Accountants?
 18 MR MASSONE: We did.
 19 COMMISSIONER: Well they said you didn't.
 20 MR MASSONE: I don't think they were
 21 interviewed here.
 22 COMMISSIONER: They were?
 23 MR MASSONE: It was another institute.
 24 COMMISSIONER: Sorry?
 25 MR MASSONE: I believe it was another

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1 institute but –

2 MS STEINBERG: They-

3 MR MASSONE: - I not sure.

4 MS STEINBERG: They said they don't

5 recall being interviewed.

6 COMMISSIONER: Yes, the Institute of

7 Chartered Accountants?

8 MS STEINBERG: Yes. They can't say they

9 weren't, they said they don't recall, they've got no record

10 of it.

11 COMMISSIONER: Well anyway, having been

12 interviewed it's quite obviously what they say and they say

13 don't break it up because that's what they've told us. But

14 the point is that everyone without exception and we've

15 invited people to come and talk to us and we, and no one

16 has come and said it was a good idea and that's why, that's

17 where I have a difficulty is when everyone has said please

18 put it together again as a matter of urgency. Then I have

19 very great difficulty seeing – you know, it may be very

20 neat as it were, if you want to now draw diagrams and it

21 might be a neat way of doing it and it might be a

22 theoretically good way of doing it. But again without deep

23 consultation and it doesn't seem there was deep

24 consultation it seems to me that it was a mistake.

25 MR MASSONE: May –

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1 COMMISSIONER: Would that be fair?

2 MR MASSONE: I don't think it was a

3 mistake. The structural change per se.

4 COMMISSIONER: Ja.

5 MR MASSONE: If I may, there were a

6 number of, a number of the quotes you will see and a number

7 of the discussion we had they were eluding to opportunities

8 to improve LBC. So I will respect the fact it was working

9 very well. I also heard people saying it could've worked

10 better. In my opinion and sorry, I don't want to put any

11 words in anyone's mouth, what I lament is the outcome and

12 clearly there's a lot of chain of events that brought to

13 the outcome. In my opinion all the others are more

14 important in the structure. Like we said yesterday yes,

15 the structure was a triggering element, I recognise that

16 and I appreciate that.

17 COMMISSIONER: Well I want to come back

18 to that because I hear that that becomes the –

19 MR MASSONE: But can I answer a question

20 –

21 COMMISSIONER: Certainly.

22 MR MASSONE: - Judge, I don't know if I'm

23 –

24 COMMISSIONER: Carry on.

25 MR MASSONE: The principle of separating

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1 two functions they are very different in nature and

2 actually opposed in terms of, how do you say, ambitions and

3 purpose. One is to audit the taxpayer and enforce payments

4 and the other one is to serve it. In principle what is the

5 criticism to that? Because I think the question is okay

6 now you see it's broken, that is a triggering point so that

7 must be the mistake. But I will like to understand from

8 someone that maybe has more experience than me that why in

9 principle separating two functions like that create a

10 problem?

11 COMMISSIONER: Well it seems it did

12 create a problem. That's – you know, I'm – you know, you

13 say I'm not more experienced than you by any means but it

14 did create a problem. That's what I'm saying. Everyone

15 has said it created a problem. So why it did, I don't

16 know. I think as I understood your answer from yesterday,

17 let me just get back to that. Is look, it shouldn't create

18 a problem if it is used properly. That was your answer and

19 it seems to be your answer to most of the things. The

20 structure is not the problem, it's how it's used. Is that

21 correct?

22 MR MASSONE: Yes, Judge, if I may you are

23 speaking with the one who designed it. The question about

24 what went wrong should be asked to the person who

25 implemented it –

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1 COMMISSIONER: No.

2 MR MASSONE: - and executed –

3 COMMISSIONER: That's what I understand.

4 You designed it but you designed an organisation that you

5 say that had it been used properly it would've achieved

6 results.

7 MR MASSONE: Yes.

8 COMMISSIONER: And you're saying it

9 wasn't used properly.

10 MR MASSONE: Yes.

11 COMMISSIONER: What I want to just, and I

12 think I just want to clarify something I put to you

13 yesterday. What you are saying to me is that there was a

14 structure that you put in place that was capable of ending

15 up where we ended up, if it was badly used which is what

16 has happened. That's your evidence, isn't that right?

17 MR MASSONE: Yes.

18 COMMISSIONER: So the SARS as we see it

19 today I think you would have to agree then was, I don't

20 like to use the word party to, I'm just getting the right

21 word, that you enabled, your structure enabled not

22 deliberately. I'm not suggesting anything like that, it's

23 no criticism, but your structure enabled what, how it was

24 used. It enabled that to be used in that way. It enabled

25 things to be fragmented by making sure that people weren't,

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1 didn't talk to each other. They didn't meet in task teams
 2 as you say. Do you agree with that?
 3 MR MASSONE: Yes.
 4 COMMISSIONER: So what has happened today
 5 was enabled by your structure. One can go at least that
 6 far.
 7 MR MASSONE: Yes.
 8 MS STEINBERG: And a part of the problem,
 9 I must go back to this, was the lack of consultation.
 10 Something that particularly annoys people from the LBC is
 11 this part of the diagnostic that says it's problematic that
 12 85% of the debt was suspended. Did you ask people in the
 13 LBC why that was the case?
 14 MR MASSONE: Well yes. Well you ask me –
 15 sorry, if I have to -
 16 MS STEINBERG: Yes.
 17 MR MASSONE: - make a general statement.
 18 You're asking me things about that was said in interviews
 19 that happened three and a half years ago. So I should say
 20 I don't know in most of the cases. So I'm presuming in
 21 this case it was asked because actually it was brought to
 22 our attention by them. We, as I said, in those interviews
 23 the biggest outcome is to have an idea of what the most
 24 important issues are, take note of the ideas and
 25 recommendation on the changes. So this idea of the debt in

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1 particular the LBC that was suspended have been raised by
 2 the people we did interview. And hence the understanding
 3 of why is it a problem, is it a lot, why is it like that
 4 has been then certainly discussed in the – unfortunately I
 5 don't have the records of all these meetings like we said.
 6 So I can only reconstruct the way we work and give an
 7 honest answer. That's the only thing I can do now. So yes
 8 we would have and the – sorry, you want to say something?
 9 MS STEINBERG: No, please finish.
 10 MR MASSONE: Yes, we would've asked and
 11 we would've been given the answer.
 12 MS STEINBERG: You see it doesn't seem
 13 like you heard the answer because or looked too deeply.
 14 You know I have here an internal memorandum from the chief
 15 officer of legal and policy to the Commissioner dated 14
 16 January 2015 and it's a proposal to establish two
 17 committees and new procedures to consider taxpayers'
 18 requests to suspend payment of disputed liability in the
 19 LBC. And underneath that is a discussion document which
 20 looks at the question of how other jurisdictions all over
 21 the world deal with the question of suspending debt and the
 22 pay now argue later question which the legal officer, the
 23 chief legal officer concludes is one of the most difficult
 24 issues that faces a tax authority. And what this
 25 memorandum is saying is that there are new issues that have

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1 arisen for large corporate tax management, transfer pricing
 2 and mispricing, these new fields and issues come up when
 3 SARS raises assessments that large taxpayers challenge.
 4 And many of them are genuine challenges because there is no
 5 precedent. There is no legal precedent to resolve them.
 6 MR MASSONE: Absolutely.
 7 MS STEINBERG: So this memorandum and the
 8 people interviewed around it say we don't think that an 85%
 9 suspension of debt was at all problematic at that stage.
 10 In fact it was appropriate given the type of debt that was
 11 being suspended and the legal processes that underlay that
 12 suspension. What is your response to that?
 13 MR MASSONE: It is possible but I don't
 14 see the link, the necessary link of what we're discussing
 15 about the enforcement to separate it by the taxpayer.
 16 MS STEINBERG: No, I've moved on to
 17 something else.
 18 MR MASSONE: Okay, sorry.
 19 MS STEINBERG: I've moved on to something
 20 else. I'm saying that again that the diagnostic raises
 21 points that make things look problematic that actually
 22 aren't and then make a case for change that isn't
 23 necessary. That's the point I'm making.
 24 MR MASSONE: Yes, all diagnostics raise a
 25 lot of questions, that's what they do, especially when they

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1 are done in a short period of time, they cannot be
 2 conclusive. They raise a lot of question on many things.
 3 For example yesterday we discussed the point on the
 4 branches. There is actually quite a large, a large part of
 5 the diagnostic and there was no action on that. Meaning
 6 that any future consideration either explain the question
 7 marks that were raised or the, in that case, the
 8 opportunity to not intervene led to no intervention. So
 9 clearly by its nature diagnostic needs to be criticising
 10 because that's what diagnostic does. It's analysing and
 11 pointing out only the things that don't work. All the
 12 things that do work are not relevant to a certain extent
 13 especially when you are trying to make a presentation that
 14 is not 150 pages, you always select the things that matter
 15 for the discussion.
 16 [14:32] MS STEINBERG: Well I would dispute that
 17 because I have seen other diagnostics for SARS which say
 18 let's consolidate what we've done so far that's worked and
 19 when I look at your diagnostic as I read to you those
 20 points about the LBC, the obvious question that comes to
 21 mind is well you're right there's not enough resources in
 22 BEPS or in High net worth individuals, well just beef it
 23 up, leave the structure as it is and beef up those
 24 particular segments. That to me is the obvious answer, not
 25 break up the unit.

1 MR MASSONE: Well you said you moved on.
 2 So my point is, yes we suggested to improve and strengthen
 3 and increase the capabilities for that reason, for the BEPS
 4 because it was and it is complicated, it is absolutely
 5 complicated.

6 MS STEINBERG: Ja.

7 MR MASSONE: I don't see the think where
 8 the breakup of the unit on this point, we didn't say that
 9 debt is high or badly managed, we didn't say it was bad
 10 managed, it's just very high. So break up the unit there
 11 was no, there was no discussion on that.

12 MS STEINBERG: No I think we're missing
 13 here. The diagnostic consistently raises problems and the
 14 implication is that these problems are so big we can't just
 15 change around the edges, we can't tweak. We need an
 16 overhaul and that's what happened. The diagnostic was used
 17 in order to justify an overhaul rather than an improvement
 18 on the edges, that's my point.

19 MR KAHLA: - are we now dealing with the
 20 split between the pre-final and post final demand in
 21 relation to the debt management or is it a totally
 22 different matter?

23 MS STEINBERG: It's a different matter.

24 MR KAHLA: Okay.

25 MS STEINBERG: It's a different matter.

1 We can deal with that, if you'd like to.

2 MR KAHLA: No, I just wanted to just to
 3 get clarity.

4 MS STEINBERG: Ja.

5 PROF KATZ: I'm not seeking that at that
 6 stage.

7 MS STEINBERG: No I mean this is simply
 8 saying look there must, the diagnostic in, really what it
 9 means it says 85% of debts suspended, something is badly
 10 wrong here. Something needs a big change because this is a
 11 big problem. Now I'm saying that's just not the case.
 12 There is no context to why 85% of debt is suspended. If
 13 there was then anyone could see there was no reason for a
 14 big change. There was a reason for a tweak. That's the
 15 point I'm making.

16 MR MASSONE: I guess this is your
 17 opinion. Well I can say this was one of the slides in, I
 18 don't know how many pages diagnostic pointing towards all
 19 the areas that we found and actually we were pointed to
 20 mostly by the people we interviewed on line and in person
 21 and the numbers we analysed. I don't see, I don't know if
 22 you can infer every slide has a direct link with an
 23 overhaul. Clearly I can understand where you're come from,
 24 that someone used it that way to justify a big overhaul. I
 25 can see -

1 MS STEINBERG: No but you used it that
 2 way Mr Massone, not someone. You recommended the overhaul.
 3 MR MASSONE: We recommended a change in
 4 the organisational structure which just many testimonies
 5 says it was actually the right structure and we still
 6 believe it is the right structure. Now we can discuss
 7 about how long it takes. So yes if, I wasn't the
 8 Commissioner, yes I would have done what you suggest I
 9 would first beef it up and maybe six months later change
 10 it, yes with the benefit of hindsight I would have done
 11 that. But still the structure recommended is the right
 12 structure for SARS. Not the only one there are possibly
 13 other two or three model and like I say nothing was
 14 necessary, they could have lived without change.

15 MS STEINBERG: Are you telling me if you
 16 came in tomorrow and were asked to do this exercise again
 17 you would make the same recommendation about structure?

18 MR MASSONE: Yes.

19 MS STEINBERG: I'm -

20 MR MASSONE: Different models, yes.

21 COMMISSIONER: But it sounds to me from
 22 what I'm hearing is that you could go into any tax
 23 authority and change it because there is no one model.

24 MR MASSONE: Yes.

25 COMMISSIONER: So if you want now to go

1 and get a job of overhauling, you can go into any tax
 2 authority and justify overhauling it, because there's
 3 always problems. You can always make it different as
 4 you've just told me.
 5 MR MASSONE: Yes.
 6 COMMISSIONER: So you're come in here and
 7 you say well we can make it different and you made it
 8 different. The question always is well why make it
 9 different just because one can make it different. But I
 10 think we're going around, around a bit now and we've heard
 11 you on that.

12 PROF KAHLA: Is the point that you were
 13 seeking to make a different or were you seeking to make it
 14 better?

15 MR MASSONE: Better, we believed and I
 16 still believe that the, I don't what the current structure
 17 is at SARS. So forgive me for that compared to the
 18 structure they had at the time.

19 COMMISSIONER: You think it was better?

20 MR MASSONE: Substantially better in many
 21 ways.

22 COMMISSIONER: Do you think other people
 23 might have a different view and think it's not better?

24 MR MASSONE: Yes but -

25 COMMISSIONER: Is there room, in other

1 words is there room for debate on this question?
 2 MR MASSONE: Some, but I think, I heard
 3 one of the witnesses say that a different consulting firm,
 4 a number of years before came to the, came up to the same
 5 conclusion and he also thought that there was the right
 6 structure, they just put in a drawer for, if I understand
 7 correctly the testimony.
 8 COMMISSIONER: Yes.
 9 MR MASSONE: So I think there is space
 10 for debate like in any structure but not much.
 11 MS STEINBERG: Mr Kahla, I wasn't going
 12 to even go to the split debts.
 13 MR KAHLA: No, no I was not suggesting.
 14 MS STEINBERG: Okay, that's alright.
 15 Just one last question on the LBC before we move on and
 16 perhaps you can enlighten me here. One of our witnesses
 17 referred to a speech that the Commissioner gave which we
 18 haven't seen before. It just says 2016, there isn't a
 19 date. But he says here that importantly we have
 20 decentralised the large business centre under the new
 21 operating model and made it accessible to business across
 22 the country. Now this is the very first time I've seen a
 23 reference to the Commissioner or anyone else saying that we
 24 actually are decentralising. We are actually taking this
 25 end to end unit and breaking it up because the LBC itself

1 was consistently assured that nothing was going to change.
 2 Did, is that what the model intended to do, to
 3 decentralise, is that something, part of your proposal or
 4 not?
 5 MR MASSONE: No, no.
 6 MS STEINBERG: No.
 7 MR MASSONE: No I want I can speculate if
 8 you want, I can speculate on that but -
 9 COMMISSIONER: Well I wouldn't speculate.
 10 MR MASSONE: No, I know the meaning of
 11 decentralisation in the context -
 12 COMMISSIONER: Sorry.
 13 MR MASSONE: I know the meaning of
 14 decentralisation which is clearly not something we
 15 recommended. Giving it was 2016 the change was already,
 16 has already happened. You said in 2016?
 17 MS STEINBERG: Yes.
 18 MR MASSONE: So the change had already
 19 happened, you said there was a communication about LBC
 20 would not change but in 2016 the change had already
 21 happened.
 22 MS STEINBERG: Yes.
 23 MS STEINBERG: Is that right, so in 2016,
 24 what he might be referring to remember when we had a
 25 discussion about the branches serving also a large

1 corporates within BAIT and we made example of a mining
 2 company in the Rustenburg area. So if I had to speculate
 3 the meaning of decentralisation in this case might have
 4 been I can provide services to large corporates that are
 5 far away from Pretoria or the central but I'm just
 6 speculating, so I have, I don't know.
 7 MS STEINBERG: Which I must say it was
 8 also misconceived because most mining companies have their
 9 headquarters in Joburg but in any event Mr Zulu tells us in
 10 his affidavit that he's quite horrified that, that anyone
 11 would think that the branches are able to deal with large
 12 businesses because they're not and they were never intended
 13 to be. But that's a separate matter.
 14 MR MASSONE: Can I clarify that because
 15 statements like that -
 16 MS STEINBERG: Please.
 17 MR MASSONE: It seems like our work was a
 18 disaster and I think, I need to start defending it a little
 19 bit, a little bit.
 20 MS STEINBERG: Go ahead.
 21 MR MASSONE: When you say we used the
 22 branches, that will mean you will create a special unit
 23 within a certain branch with the people with the right
 24 capability they will use this space, remember yesterday we
 25 spoke about co-locating people that will be in the branches

1 and might be interested in the, in a certain area of the
 2 country. So -
 3 MS STEINBERG: So your proposal was not,
 4 was to put up specialised units in those branches?
 5 MR MASSONE: It was one of the
 6 opportunities, we never went to that level of detail,
 7 remember branches actually didn't change much but in the
 8 idea and I'm following up on the concept of
 9 decentralisation was I can, I have big spaces I can cover
 10 out a little office where I have two or three specialist,
 11 they could either travel, not being necessarily there all
 12 the time by appointment for example to serve the corporates
 13 that are in a certain area which is not where we have the
 14 LBC offices. But again I'm speculating -
 15 MS STEINBERG: No I understand.
 16 MR MASSONE: Because the word
 17 decentralisation means spreading out on the territory, it
 18 doesn't mean the idea of separating the two lines, is a
 19 very different -
 20 MS STEINBERG: No I hear you and sadly
 21 what happened is half that proposal was implemented without
 22 the other half. So large business clients were sent to
 23 those branches where no one was able to help them and
 24 that's caused a lot of frustration.
 25 MR MASSONE: Execution.

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1 COMMISSIONER: Can I just ask, we were
 2 told that about 200 managerial staff were dislocated when
 3 they introduced this, did you expect there to be 200 people
 4 dislocated, when I mean dislocated, I mean told you're
 5 job's gone you've got to apply for another job? Did you
 6 expect that to happen?
 7 MR MASSONE: Can I clarify the question,
 8 I mean I heard and I also remember there were a few people,
 9 I don't think to wonder that had, didn't have any object
 10 and someone destroys, I read, are actually terrible. The
 11 process of people applying for the job I think was applied
 12 to everyone. So everyone had to apply for a new job and
 13 that was the process, it was signed by the law firm which
 14 has said I recognise because I saw that happening in other
 15 firms in South Africa where everyone applies for more than
 16 one job and then gets appointed or not. So I guess they're
 17 two different thing, I don't know what you're referring to.
 18 One is the application of the job and one people without a
 19 job.
 20 COMMISSIONER: No I'm not talking about
 21 being without a job. I'm talking about being displaced in
 22 the sense of your job has disappeared, no you must apply
 23 for a substitute job of one kind or another in the
 24 structure. That seems, that's what happened to about 200
 25 people I'm told.

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1 MR MASSONE: No, we would not have
 2 expected that, absolutely. I think some of the titles have
 3 changed, so if you break up a unit and you put them into
 4 different parts there is a managerial job that is not there
 5 anymore. But the idea was to, like I said yes everyone had
 6 a job at the end of the process and so hearing there's 200
 7 people is concerning.
 8 MR KAHLA: But why would you have
 9 expected that there could potentially be displacements, if
 10 you change structure such that some of the roles would have
 11 changed or even disappeared.
 12 MR MASSONE: Because many new were
 13 created as well at the same time.
 14 MR KAHLA: Okay.
 15 MR MASSONE: And the sum was going to be
 16 zero, that was the idea.
 17 PROF KATZ: May I just ask -
 18 MR KAHLA: But when you speak, sorry,
 19 sorry when you speak about the sum was going to be zero
 20 purely on the basis that that was the parameter that there
 21 would be no one taken out of the organisation but it didn't
 22 necessary mean that everybody would find placement within
 23 the organisation immediately, or was that the expectation?
 24 MR MASSONE: The expectation was everyone
 25 would find, I remember the, and I don't want to quote the

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1 number that's wrong, but a few, 20, 30, 40 people,
 2 something like that, forgive me, were then didn't find it,
 3 that's what I remember but this was the end, end of our
 4 mandate around June 16. So I remember hearing that. I
 5 didn't recall, I didn't hear about 200 which is a lot,
 6 which is a lot.
 7 PROF KATZ: So -
 8 MR MASSONE: But the mandate was to have
 9 everyone reallocated, especially if they were managers
 10 because they were the senior people.
 11 PROF KATZ: Sorry Mr Massone. I've got,
 12 similar to a question I asked you yesterday. You know the
 13 organisation well. You know and you're experienced
 14 consultants You have an institution that's working well and
 15 in a relatively short period of time becomes a failed
 16 institution. What do you think could be the explanation
 17 for that?
 18 MR MASSONE: Yes, and again with the
 19 benefit of hindsight now I know, I wish I knew at the time.
 20 Too much change in leadership, and one could actually say
 21 not expert enough on the topic, possibly not capable
 22 enough. Second, in the process, I don't know if we're
 23 going to go through the change management process, people
 24 were actually upset by the way the whole thing was
 25 unveiled, the transparency, the communication, the support,

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1 the explanation, the buy in, etcetera and third, the fact
 2 that when you have now broken up enforcement and LBC
 3 enforcement and taxpayers and especially the head of the
 4 unit is not there anymore and possibly the head of the
 5 junior units are not there anymore I don't know if that
 6 happened as well. Then you need to do a surgical operation
 7 to make sure that there is still, talk to each other and
 8 they speak the same language, yes they were speaking about
 9 priorities, they had the same priorities, they look at the
 10 same reports and same numbers. So you need to create that
 11 softer element to make it work again. I think also what
 12 happened and there was a general environment there wasn't
 13 so much criticism on SARS coming from outside and possibly
 14 coming from outside, those were the culture became a big
 15 problem that drive performance, culture does that a lot.
 16 That my opinion, Professor.
 17 COMMISSIONER: It goes back to saying
 18 look you created a structure, it could have been used for
 19 good, it could also be used for bad, as it were? It was,
 20 well we know, it's obvious, so there's the structure if it
 21 didn't turn out well it was because the structure allowed
 22 it but not necessarily intended to allow it. That's, I
 23 think we're going around a bit.
 24 MR MASSONE: Yes, Judge, can I say
 25 something on that because someone told me about one of the

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1 comments that Minister Nene made this morning about the
2 work they've done at DBSA so I can mention that. While it
3 was the same team that work at SARS and I think the great
4 work he is speaking about is the great work of his team.
5 The leadership team at DBSA of which we were helping and I
6 think when he criticises the work here, I don't want to put
7 words in his mouth but that's my opinion, he's criticising
8 the work of the people that actually executed it and the
9 consultants weren't part of that. So in the same way I
10 never took any, we never took any credit except asking for
11 references maybe, for the work at DBSA I am taking a lot of
12 pain for the work we have done at SARS. That's why, so I
13 want to thank him for having said that. It was the same
14 team.

15 MS STEINBERG: Judge I was going to go
16 onto customs but I'm actually wondering now if it's
17 necessary.

18 COMMISSIONER: I think so.

19 MS STEINBERG: Ja. I think we end up
20 talking about -

21 COMMISSIONER: Ja, -

22 MS STEINBERG: The same issues.

23 COMMISSIONER: Ja.

24 MS STEINBERG: Regardless, ja. I think
25 then we, you know there are a couple of those procurement

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1 another question.

2 MS STEINBERG: Yes.

3 COMMISSIONER: Did you meet him at all in
4 connection with SARS before you tendered?

5 MR MASSONE: Yes we had one meeting with
6 him.

7 COMMISSIONER: When was that?

8 MR MASSONE: I don't remember exactly
9 when was that, it must have been around, ja 2013, 2014 and
10 we presented him an outside point of view on SARS, outside
11 in, sorry.

12 COMMISSIONER: You say 2013/2014, you
13 only started here on the 27th of September 2014?

14 MR MASSONE: Yes.

15 COMMISSIONER: You say in 13 it could
16 have been in 2013?

17 MR MASSONE: Yes.

18 COMMISSIONER: You met him to talk about
19 SARS?

20 MR MASSONE: Yes, he asked us about that.

21 MR KAHLA: Is that before he started
22 working at SARS or after he had been at SARS?

23 MR MASSONE: I think it was before.

24 MS STEINBERG: So why was he asking about
25 SARS while he was the Commissioner of Correctional

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1 issues that came up this morning and I think we should just
2 end with that, if that's alright with you. Mr Massone,
3 have you met Mr Moyane before he started working here?

4 MR MASSONE: Yes.

5 MS STEINBERG: When was that?

6 MR MASSONE: I, as I was building the
7 business in South Africa, I was meeting a lot of people, it
8 must have been around 2012, 2013, something like that. I
9 was meeting, ja all the possible leaders and I still do
10 that in the country.

11 COMMISSIONER: Sorry he was the
12 Commissioner of Correctional Services at that time?

13 MR MASSONE: He must have been, must have
14 been.

15 COMMISSIONER: What would have been your
16 relationship with the correctional services?

17 MR MASSONE: None.

18 COMMISSIONER: So where, in what way,
19 context -

20 MR MASSONE: Meeting people at events and
21 situations and so on.

22 COMMISSIONER: Carry on.

23 MS STEINBERG: Now the Treasury official

24 -

25 COMMISSIONER: Sorry can I just ask

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1 Services?

2 MR MASSONE: I don't know, he was still
3 at the time Commissioner of Correctional Services, it might
4 have been another position, I think his ambition was that
5 and he want to have a point of view on that, on SARS and he
6 was interested in our work for other state owned enterprise
7 companies in the private sector and this is something that
8 we do normally, we meet people and express points of views
9 on companies, we do that all the time. So it wasn't -

10 MS STEINBERG: No, I understand that, I'm
11 just interested that before he was Commissioner of SARS he
12 was asking you your advice about SARS.

13 MR MASSONE: Yes.

14 PROF KATZ: Sorry, did you ask him why he
15 was asking you that?

16 MR MASSONE: He said his ambition was
17 that.

18 COMMISSIONER: Sorry his?

19 MR MASSONE: His ambition as to become
20 the Commissioner of SARS which is something which it is
21 absolutely normal to see, before having a position and
22 maybe they are in the short phasing of the selection
23 process they ask his point of view on companies and that's
24 something we do normally.

25 COMMISSIONER: And what was your view

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1 about SARS, what did you tell him?
 2 MR MASSONE: Well it was an outside view,
 3 so, any public data that was available in the media and in
 4 the public reports so it was a, I remember a pretty
 5 position point of view and there was some description on
 6 modernisation and so that was the description. Maybe some
 7 numbers on how many people are there -
 8 [14:52] COMMISSIONER: So he asked you about
 9 SARS?
 10 MR MASSONE: Yes.
 11 COMMISSIONER: What did you tell him
 12 about SARS?
 13 MR MASSONE: This that I'm saying, so -
 14 COMMISSIONER: Things that you read in
 15 the newspaper, you say?
 16 MR MASSONE: That's what normally
 17 happens. You read public reports so there's a lot of
 18 information there, there is a lot on the website. You see
 19 what people are saying, institutions, etcetera and you
 20 create a five, six, ten pages summary on that.
 21 COMMISSIONER: Just so we're clear. I'm
 22 not interested in what normally happens, I'm interested in
 23 what actually happened.
 24 MR MASSONE: This is what happened.
 25 PROF KATZ: But did you know he was going

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1 to ask you about SARS, that you'd prepared reading all
 2 these websites and reports?
 3 COMMISSIONER: If you don't mind, please.
 4 MR MASSONE: Can you repeat the question?
 5 PROF KATZ: Did you know that when you
 6 were going to meet him that he would ask you about your
 7 views about SARS so that you had prepared and read all the
 8 websites and reports and everything?
 9 MR MASSONE: Yes, he asked us about that,
 10 yes.
 11 PROF KATZ: Yes but how did you know he
 12 was going to ask you about it?
 13 MR MASSONE: No he called us and said,
 14 can I meet you on this topic?
 15 COMMISSIONER: Okay. And so are you
 16 saying you then went and read up about SARS?
 17 MR MASSONE: We spent, I don't know a few
 18 days to do that and we put together a document, yes.
 19 COMMISSIONER: What was the document you
 20 put together? Do you have it?
 21 MR MASSONE: I don't think I have it now
 22 but I certainly would like to find it. It was -
 23 COMMISSIONER: Will it be in your
 24 offices, do you think?
 25 MR MASSONE: In some PC yes, not in mine

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1 but I will try to find. It's quite a long time ago, yes.
 2 But it would be outside in data speaking about what, in
 3 this case I remember the modernisation was one of the
 4 topics that was quite a highly represented in the annual
 5 report and a few other public figures.
 6 PROF KATZ: Sorry and that was quite a
 7 while before he was appointed as Commissioner?
 8 MR MASSONE: I cannot locate the data in
 9 my mind. I wasn't prepared to have this discussion.
 10 PROF KATZ: But before he was
 11 Commissioner?
 12 MR MASSONE: I must believe, yes.
 13 MS STEINBERG: Did he pay you for that
 14 work?
 15 MR MASSONE: Sorry?
 16 MS STEINBERG: Did he pay you for that
 17 work?
 18 MR MASSONE: No. Like I said this is
 19 something that we normally do. We normally already have a
 20 lot of point of views in our desk research or many
 21 companies. We don't even need to do additional work, so
 22 absolutely not.
 23 COMMISSIONER: What was the follow up
 24 after you had made your presentation?
 25 MR MASSONE: Nothing.

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1 COMMISSIONER: Did you not see him again?
 2 MR MASSONE: Well I bumped into him in
 3 places, residence of the American Ambassador in other
 4 situations like that but nothing specific.
 5 MS STEINBERG: So we heard this morning
 6 that Mr Moyane had identified Bain even before the closed
 7 tender because he had requested from Telkom this
 8 transversal contract. Now the witness this morning said
 9 that Mr Moyane would have had to have approached Bain first
 10 before approaching Telkom in order to even make that
 11 possible. Did he do so?
 12 MR MASSONE: Well that's what I just
 13 said. So he knew us, I think he heard our reputation in
 14 the market and possibly had spoken with other CEOs about
 15 that.
 16 MS STEINBERG: So did he approach you
 17 about the possibility of him approaching Telkom?
 18 MR MASSONE: No.
 19 MS STEINBERG: No.
 20 MR MASSONE: No. It's the first time I
 21 heard about that.
 22 MS STEINBERG: Right. That was my
 23 question, yes. The next issue that the witness from
 24 Treasury raised was that the invitation to the five or six
 25 companies that SARS had identified was issued on the 11th

1 and that Bain put in their proposal on the 12th and the
 2 question he said that that raised is whether Bain had prior
 3 information. His inference was that Bain would have had
 4 prior information because it wasn't possible to draw up
 5 your proposal that quickly. Did you have prior
 6 information?
 7 MR MASSONE: No we did not.
 8 MS STEINBERG: So you got, along with
 9 everyone else, you got the invitation on the 11th and you
 10 submitted on the 12th?
 11 MR MASSONE: I don't remember the dates
 12 but I imagine so, yes. Most of these submissions are
 13 methodological material and I understand he said he
 14 wouldn't be able to compile but it's actually not very
 15 complicated and when you have methodology and you have,
 16 like I said a few out-siding view mostly there will be the
 17 submission.
 18 COMMISSIONER: Sorry, how did you know
 19 that there were going to be an invitation to bid?
 20 MR MASSONE: No we didn't know.
 21 COMMISSIONER: But at some time you did
 22 know because you bid. How does that information come to
 23 your knowledge? Did someone phone you and say would you
 24 like to submit a bid?
 25 MR MASSONE: I don't remember Judge,

1 normally it's a mail, I don't remember Judge. Normally it
 2 is a mail from SARS.
 3 PROF KATZ: Can I just go back slightly
 4 with one thing, Advocate?
 5 MS STEINBERG: Yes.
 6 PROF KATZ: When you had that discussion,
 7 Mr Massone, with the Commissioner and he asked you about
 8 your views about SARS, did he express any views where he
 9 thought SARS should be going, and what he would like to
 10 achieve in SARS?
 11 MR MASSONE: No absolutely not.
 12 MR KAHLA: Yes besides him, I'm just
 13 trying to think now, you spoke to Mr Moyane prior to him
 14 becoming a Commissioner, were there any other public office
 15 bearers you met with and discussed any matter relating to
 16 what could be done at SARS?
 17 MR MASSONE: That I recollect, no. No.
 18 PROF KATZ: Sorry, one more, I'm sorry
 19 Advocate, may I?
 20 MS STEINBERG: No, carry on, ja.
 21 PROF KATZ: Sorry Mr Massone, did you
 22 ever talk to the Commissioner about what his vision would
 23 be about SARS, what he would like to achieve in SARS?
 24 MR MASSONE: No.
 25 MS STEINBERG: The other red flag that

1 the witness this morning raised was that with the 50%
 2 discount that you gave SARS, your bid came in fractionally
 3 under McKinsey's bid. Did anyone tell you what McKinsey
 4 had bid beforehand?
 5 MR MASSONE: Absolutely not. Absolutely
 6 not.
 7 MS STEINBERG: I'm wrapping up on
 8 procurement. If there are any other questions, please ask
 9 them.
 10 COMMISSIONER: From my part not at the
 11 moment but there may come a time that we would ask you to
 12 come and talk to us again about procurement.
 13 MS STEINBERG: Ja.
 14 PROF KATZ: Sorry Mr Massone, you were
 15 here when Mr Tshitangano explained that whole process and
 16 his concerns. Did you have any views on that, what he said
 17 this morning?
 18 MR MASSONE: If I may only one. Actually
 19 I have no comments on all the process, like I said I barely
 20 understand it. The one thing then I think I need to
 21 clarify is that he said that our fees – if I recollect and
 22 correct me if I'm wrong – our fees were double than the
 23 second competitor. So I don't know but my question would
 24 be because the fees of management consulting firms are very
 25 similar. There is a market and even if someone would like

1 to have higher prices than eventually the market adjust
 2 that, and so I don't know exactly the fees of our
 3 competitors more or less are the same. What changes is the
 4 time and the number of people that you need to put on a
 5 project and a combination of the fees, call them per diem
 6 is the wrong term but call them per diem and the number of
 7 people and number of ways they find the price you
 8 eventually offer the client.
 9 PROF KATZ: My recollection on that,
 10 sorry, was he said when the motivation was made for the
 11 appointment of the second phase, one of the points of
 12 motivation was that they were less, their competitor was
 13 double and that was one of the reasons why they are such a
 14 favourable party to get the contract. That's my
 15 understanding.
 16 MS STEINBERG: Professor Katz, that's
 17 correct, but may I say that we haven't had sight yet of
 18 those documents. We were handed them today. So I think
 19 this is something we'd have to look at because I can't
 20 answer that now.
 21 MR MASSONE: Can I finish my line of
 22 thinking?
 23 MS STEINBERG: Please.
 24 MR MASSONE: It's a more of reality of
 25 reality. So I would be very surprised that the

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1 competitor's fees were actually at a per diem level half of
 2 ours, just so we, or sort of half of ours. And yesterday
 3 if you remember we said when we have engagement with new
 4 clients who we don't know and we need to make investments
 5 we translate that into a discount. Sort of saying if we
 6 had prior knowledge of SARS intimately because we had
 7 worked there for two or three or four years, the number of
 8 people and the number of weeks would have been lower.
 9 Actually what we normally do, a new CEO comes in, we say we
 10 have been working here for a number of years, can we come
 11 and express our point of view or we think ideas of
 12 improvement, so we do it for free. It's just a, we don't
 13 need to do any work, it's just a collection and maybe some
 14 selection of matter and so that would be free.
 15 So one of the points when I say our fees could
 16 not, I stand to be corrected, at the per diem level double
 17 than the competition. It is the number of people they
 18 needed to have because they had prior knowledge of the
 19 institution and they needed actually like I say you could
 20 probably do that on a – ja for free because you already
 21 have all the information and you already have all the
 22 material that you need.
 23 COMMISSIONER: But you understand where
 24 the problem lies don't you?
 25 MR MASSONE: Yes.

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1 COMMISSIONER: I mean this is a – you
 2 know one should be bidding competitively. So you bid
 3 competitively for three or R4 million and you end up with a
 4 contract not that competitively for R161. I mean you can
 5 see the problem.
 6 MR MASSONE: Yes.
 7 COMMISSIONER: And particularly when one
 8 sees and they say well they're going to get it at the same
 9 rates as the rates that applied when there's a competitive
 10 bid which is just not true.
 11 MR MASSONE: Yes I can only defend my own
 12 point of view which is – I think you have our submission at
 13 the time, we specifically stated any further continuation
 14 would happen at full fees. Despite that we had to then
 15 give the discount which also stayed flat and actually I
 16 think there is a mistake when they speak about phase 3.
 17 And if I may clarify phase 3 was actually a consequence of
 18 phase 2 on the customs side. That's maybe the other point
 19 I want to make. It was actually let's create a pilot of
 20 what came out during phase 2 and there was a specific pilot
 21 there. So I thought – but the point I want to make is the
 22 fees stayed flat as the time was passing by and because
 23 there is inflation in South Africa and normally we increase
 24 fees by inflation. The 12% that was mentioned as a
 25 discount at the end of 2016 was actually higher than that,

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1 it was probably 19%.
 2 COMMISSIONER: Anyway you've got the
 3 point that it's –
 4 MR MASSONE: Absolutely. I'm just
 5 defending my side –
 6 COMMISSIONER: No I understand that. I
 7 presume you still have your bid, don't you?
 8 MR MASSONE: I think we submitted it.
 9 COMMISSIONER: Have we got it?
 10 MS STEINBERG: Ja we have it.
 11 MR KAHLA: I just want to come back to
 12 phase 2, phase 3.
 13 MR MASSONE: Yes.
 14 MR KAHLA: So according to Bain what you
 15 were doing in the pilot I think is the goods control,
 16 custom goods control project. That project which is now
 17 called phase 3 was not required for the completion of phase
 18 2. Phase 2 could stand on its own and be closed and you
 19 could then have something new around how you seek to put
 20 into place what had been decided on in relation to phase 2.
 21 The two are not connected, phase 2 and phase 3 are not
 22 connected.
 23 MR MASSONE: They are connected, strictly
 24 connected. The team, our team and the customs team were
 25 actually the same people who continued to work on the same

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1 topic in a specific fashion with the idea of creating a
 2 blueprint. It was then going to implement it across the
 3 different types of entry ports. In this case we work on
 4 the Durban port and on the Oliver Tambo airport. But then
 5 the idea was the implementation would have happened in all
 6 the ports of entry. So it was a direct consequence.
 7 MR KAHLA: So would phase 2 have been
 8 incomplete without phase 3?
 9 MR MASSONE: Yes, yes, yes.
 10 MR KAHLA: And without the pilot in
 11 respect of goods control your work set out in phase 2 would
 12 have been incomplete.
 13 MR MASSONE: It would have been, there's
 14 always the consideration the client can do that on their
 15 own, that's always – having said that the client
 16 theoretically could have done that on their own, not in
 17 this case, it depends on the experience and the number of
 18 people you have. But yes it was direct consequence of
 19 that, the completion of that.
 20 MR KAHLA: But was phase 3 – when you bid
 21 for phase 2, the work to be done in phase 2 did it conclude
 22 what ended up being done in phase 3?
 23 MR MASSONE: No, no.
 24 MR KAHLA: So phase 2 could have been
 25 closed on its own and somebody else asked to come and do

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1 whatever needed to be done which ended up being done in
 2 phase 3.
 3 MR MASSONE: Theoretically you can always
 4 do that, theoretically, but there's almost one year of work
 5 that you would lose at least on the consultant's side. And
 6 so theoretically yes.
 7 COMMISSIONER: I just want to clarify
 8 another thing you said yesterday and that is, as I
 9 understand it, the final model that was put in place you
 10 didn't approve of all of it, but your client says that
 11 what's I want and as you say if the client wants it that's
 12 his choice. Is that right?
 13 MR MASSONE: Yes with – it wasn't that
 14 terrible, it was still an improvement compared to the
 15 previous one –
 16 COMMISSIONER: Maybe, but you didn't
 17 agree with everything in it.
 18 MR MASSONE: No.
 19 COMMISSIONER: And you see I can
 20 understand that in the private sphere, but in the public
 21 sphere you'll know for example it's going to the Minister,
 22 he needs to sign off on it, correct?
 23 MR MASSONE: Yes that's what we were told
 24 –
 25 COMMISSIONER: I mean shouldn't you tell

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1 the Minister you don't agree with it all? You see the
 2 Minister – Bain & Company is a well-known company, the
 3 document goes, Bain & Company's proposal, it's actually not
 4 Bain & Company's proposal. You don't agree with some of
 5 it. Did you tell the Minister you don't agree with some
 6 it?
 7 MR MASSONE: Well I didn't because I
 8 didn't know him. I think because we were contracted by
 9 SARS I think it would have been a violation of our
 10 relationship and actually our contractual obligation and
 11 confidentiality with SARS.
 12 COMMISSIONER: To the Minister who has to
 13 sign off on it?
 14 MR MASSONE: Yes.
 15 COMMISSIONER: Are you saying – are you
 16 serious that you think you don't have to disclose to the
 17 Minister that you don't agree with it when you know he has
 18 to sign off on it? And your name is at the bottom.
 19 MR MASSONE: I don't think I have an
 20 obligation but also in this case I think, I stand to be
 21 corrected on that, that it would be outside SARS's
 22 institution and then be violating the oath of secrecy that
 23 I have signed.
 24 COMMISSIONER: And the same would apply
 25 to Judge Kroon when you make the presentation to him you

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1 wouldn't say look Bain doesn't agree with some of this.
 2 MR MASSONE: We met Judge Kroon before
 3 the fifth structure, but in that case we would have been
 4 asked by the Commissioner so clearly we were authorised to
 5 do that.
 6 COMMISSIONER: But Judge Kroon was never
 7 shown the fifth structure, the last one.
 8 MR MASSONE: I believe – not from us,
 9 sorry not from us.
 10 MR KAHLA: But isn't it that nothing
 11 really turns on the fifth structure because even though it
 12 was not what you proposed you had no objection to it?
 13 MR MASSONE: We had some objections, we
 14 accepted to implement it because it was still within broad
 15 parameters of our design principles. And still an
 16 improvement compared to the past.
 17 MR KAHLA: But your view that you could
 18 still live with the fifth structure.
 19 MR MASSONE: Yes.
 20 COMMISSIONER: And if you weren't under
 21 your believed oath of secrecy would you have told the
 22 Minister that you didn't approve of it all?
 23 MR MASSONE: No also because that doesn't
 24 represent our point of view. I would have said – yes there
 25 were other models that could have worked a bit better –

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1 COMMISSIONER: No, no we got to the stage
 2 where you said look we didn't – the Commissioner asked for
 3 some things. It wasn't - we didn't approve of it, but if
 4 that's what the client wants that's what the client will
 5 get. Do you recall that evidence?
 6 MR MASSONE: Yes.
 7 COMMISSIONER: So some of it was not
 8 approved by you.
 9 MR MASSONE: We disagreed on some of the
 10 changes, but in the complex we were okay with that, in fact
 11 we accepted it and –
 12 COMMISSIONER: I'm not sure if that's
 13 exactly what you said yesterday, but we'll look at the
 14 record.
 15 MR KAHLA: But you're not suggesting that
 16 you had major difficulties because you're say that the
 17 fifth structure was consistent with your design principles.
 18 MR MASSONE: Broadly consistent and
 19 better than the previous. I mean before breaching the
 20 client confidentiality and even who has contracted us I
 21 would have left the place if the contract had allowed me
 22 before -
 23 COMMISSIONER: Well you still haven't
 24 really dealt with my question which was, you said to me no
 25 we didn't say anything to the Minister because we feel

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1 we're not allowed to. If you had not – if you had been
 2 allowed to, if you believed you were allowed to would you
 3 have said anything to the Minister?
 4 MR MASSONE: Yes and I had also – not,
 5 sorry not because I felt compelled to do that, an
 6 obligation because I don't think that's part of our
 7 mandate. But in terms of advising him, advising I would
 8 have said well there were other potential models maybe a
 9 bit better than what you have been submitted to. That's
 10 what I would have done.
 11 COMMISSIONER: But you would have not
 12 said to him the Commissioner wanted these changes, it was
 13 not our proposal, but the Commissioner wanted them.
 14 MR MASSONE: And if he wasn't –
 15 COMMISSIONER: Sorry, would you have said
 16 to the Minister?
 17 MR MASSONE: Yes if he was interested in
 18 my opinion I would have said yes this is the two or three
 19 changes that -
 20 COMMISSIONER: Please you must answer the
 21 question. I didn't ask if he was interested in your
 22 opinion. I said if you had not considered yourself bound
 23 by your oath of secrecy and you knew this was going to the
 24 Minister would you have put a note on it saying Minister
 25 some of these are not ours it's the Commissioner's request.

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1 MR MASSONE: Not formally.
 2 COMMISSIONER: You would not have said
 3 that.
 4 MR MASSONE: Not formally no.
 5 COMMISSIONER: When you say not formally
 6 would you have done so informally?
 7 MR MASSONE: It's a possibility. You are
 8 having a conversation and –
 9 COMMISSIONER: No I'm talking about the
 10 document that goes to the Minister, would you have said on
 11 the document some of these are the Commissioner's requests
 12 not mine?
 13 MR MASSONE: Well that's not the work we
 14 do so –
 15 PROF KATZ: Sorry, Mr Massone, an answer
 16 to the Judge's question.
 17 MR MASSONE: Yes.
 18 PROF KATZ: If I know that an opinion I
 19 give or that a client is going to take my opinion to an
 20 authority and I know that he's not going to give my full
 21 opinion. I say to him you can only use my name if you give
 22 -
 23 [15:12] Wouldn't the thing have been, you know that it is
 24 going to be use, you know Bains? Don't you say to your
 25 client then I want your assurance that you will tell the

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1 Minister I'm not going to, that this doesn't have Bains
 2 approval?
 3 MR MASSONE: Thank you for the
 4 clarification. Sorry, in the normal world where we live,
 5 and I understand here we are speaking about exceptional
 6 situations, we provide a CEO, for example, and sorry if I
 7 go to the private sector, or we provide the Commissioner
 8 with the options and he makes the decision, he doesn't go
 9 to the board, or whoever is oversight authority and say
 10 this is Bain structure, he will say this is my structure
 11 and I'm presenting it to you and have it approved or not.
 12 So I didn't think, and actually I'm surprised if he did
 13 that, I'm surprised that he went to the Minister and said
 14 this is Bain's structure. He should have said that this is
 15 my structure. So to answer your question as I understand,
 16 knowing he would have gone, he was going to the Minister
 17 and saying this is Bain's structure as such, he had to
 18 prove it, I would have certainly asked the Commissioner not
 19 to do that and say this is your structure and get it
 20 approved or not, not use my name on it.
 21 PROF KATZ: Did you ask the Minister not
 22 to? You know that he's going to use your, the
 23 Commissioner's going to use and going to say he's engaged
 24 by him, did you say to him then but tell them that I don't
 25 fully approve this?

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1 MR MASSONE: I would have said that.
 2 Knowing that he was going to be – no, I didn't know him. I
 3 also didn't know he was going to say this is Bain's
 4 structure and as such you need to approve it.
 5 MR KAHLA: So you weren't aware that what
 6 was going to be presented to the Minister as the fixed
 7 structure would be presented as a Bain proposal?
 8 MR MASSONE: Absolutely.
 9 MS MASILO: Mr Massone –
 10 MR MASSONE: And actually frankly I don't
 11 see in the world I live, the principal, the client takes
 12 accountability for whatever decision he has made and he
 13 doesn't say he's a consultant. That actually would
 14 diminish, in my opinion the power of his proposal because
 15 he's saying I'm not sure about it, but I'm telling you as a
 16 consultant, and actually diminishes his own position. A
 17 CEO that does that, he can say it's been done by a, say
 18 this is what Bain proposed and I'm, I don't have an opinion
 19 on that, I'm just implementing what Bain is saying is
 20 actually not what I've seen.
 21 MS MASILO: Sorry, I just wanted to find
 22 out if you – okay, if you sent a letter at least to the
 23 Commissioner to state the objection that you had with
 24 respect to the fifth proposal.
 25 MR MASSONE: We may have done it, I don't

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1 remember. We certainly have expressed it in a few
 2 meetings.
 3 MS MASILO: Just for record purposes did
 4 you do it in writing?
 5 MR MASSONE: I don't remember, probably
 6 not.
 7 MS MASILO: Okay.
 8 MR KAHLA: But was it material enough for
 9 you to express it in writing, to express it?
 10 MR MASSONE: That's the point, so
 11 probably it wasn't but certainly the concerns were
 12 expressed.
 13 MR KAHLA: I keep on coming back to this
 14 because I'm trying to understand whether you considered the
 15 fifth structure so materially different from what you had
 16 proposed, or rather it was simply a preference you would
 17 have approached it differently, but you had no fundamental
 18 differences around it, did you?
 19 MR MASSONE: We know we didn't have any
 20 fundamental objections because we were still respecting the
 21 design principles, but we didn't think it was the best one
 22 for SARS at the time. For that concentration of complexity
 23 in one single position.
 24 COMMISSIONER: Any more?
 25 MS STEINBERG: As the advocates for the

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1 commission we now have to consider what conclusions we put
 2 before the commission. And to underline, this is one of
 3 the conclusions that I'm considering, and I want to give
 4 you an opportunity to respond to it. In short it's that
 5 Bain put in this half price quotation in order to get a
 6 foot in the door and do a quick and inadequate diagnostic
 7 and Bain made sure that that diagnostic said that this
 8 organisation needs radical restructuring because that
 9 secured the next two big contracts. And the fact that
 10 there was, that in terms of the big contracts, SARS never
 11 went to the market, was in fact was always part of the
 12 scheme. Do you want to comment on that?
 13 COMMISSIONER: Do you want to respond to
 14 that?
 15 MR MASSONE: You can send that same in
 16 writing. Certainly inadequate I can object to that. I
 17 think the work is solid. We may have missed a few people
 18 that you highlighted. It was not our decision. I believe
 19 the work is very, very solid so I want to defend that. And
 20 the idea of the scheme also I don't understand what that
 21 means but we don't create problems to the client just so
 22 they call us to resolve it. That's not our ethical
 23 standards, principles. Like I said we win in the market
 24 because we have success stories and we have people that
 25 provide references for us, so we don't kind of break the

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1 toy just to then or even say the toy is broken just so we
 2 can, so I kind of strongly object the concept of the scheme
 3 and the fact that we created a diagnostic that was just
 4 used to get additional work. Absolutely that's not what we
 5 do, absolutely not what we do.
 6 MS STEINBERG: You are welcome to make
 7 another written submission and as I say that's merely under
 8 consideration, it's certainly not the conclusion we've
 9 reached now. I'm ready to begin wrapping up, so before I
 10 do, are there any? Mr Massone, now that we know what's
 11 occurred, I'd like to go back to the beginning where you
 12 said you wanted to apologise and I want to ask you, what do
 13 you want to apologise for?
 14 MR MASSONE: Well so I heard in some of
 15 the transcripts that we might have, and I imagine they are
 16 all under oath, not treated professionally some of the
 17 people that you interviewed. The 12 minutes meeting or
 18 whatever they might have felt that that created this
 19 aggravation against us. So for that I want to apologise.
 20 That's the only thing.
 21 MS STEINBERG: You want to apologise to –
 22 MR MASSONE: The people.
 23 MS STEINBERG: The people in SARS.
 24 MR MASSONE: I think there is a sense of
 25 kind of discomfort of being part of these events, that

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1 certainly is. I don't think I have to apologise for
 2 anything and I think –
 3 COMMISSIONER: No well Sir, just going
 4 back to when you said at the beginning, I want to apologise
 5 and I said leave the apologies, let's see what happens.
 6 But you say you don't want to apologise?
 7 MR MASSONE: No, no, I want –
 8 COMMISSIONER: You don't think there is
 9 anything to apologise.
 10 MR MASSONE: I said people, in my opening
 11 statement I said there's a lot of lessons learned and I
 12 think I apologise to the people that felt mistreated.
 13 That's absolutely not what we stand for, nor who I think we
 14 are, and so for that I apologise.
 15 MS STEINBERG: Do you think you should
 16 apologise to South African taxpayers?
 17 MR MASSONE: Why do you think so?
 18 COMMISSIONER: Well I don't know, she
 19 doesn't think so, she says do you think so?
 20 MR MASSONE: No.
 21 MS STEINBERG: No?
 22 COMMISSIONER: Thanks.
 23 MS STEINBERG: Thank you.
 24 COMMISSIONER: Thank you very much. We
 25 might ask you to come back again but we'll just have to see

1 where we go. Thank you very much.
2 MR MASSONE: Thank you.
3 [NO FURTHER QUESTIONS – WITNESS EXCUSED]
4 COMMISSIONER: Ms Steinberg, are we
5 finished for the day?
6 MS STEINBERG: We are, Judge.
7 COMMISSIONER: I think I should just let
8 you know there's quite a bit of work that has to be done
9 from now on. I'm not quite sure when we'll have the next
10 session of public hearings, but probably not until the
11 beginning of October. Thank you.
12 [INQUIRY ADJOURNED]
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<p>2037:10 2038:7 2044:24 2048:24 2113:25 somebody's 2012:24 soon 2032:6 sophisticated 2005:9 2012:13 sorry 1938:15 1953:14 1955:2 1967:22 1968:7 1975:1 1976:24 1991:3 2001:17 2005:4,22 2008:24 2009:20 2014:4 2017:20 2018:9 2028:9,9,13 2028:23 2054:5 2060:7 2063:20 2066:13,25 2072:9 2077:5,24 2079:10 2082:15 2083:8 2084:18 2091:12 2095:18,19 2096:11 2099:11,25 2100:11 2101:14,18 2104:6,15 2106:18 2107:18,18 2107:21 2108:14 2109:10 2116:9 2118:5,15 2119:15 2120:4,6 2121:21 sort 1963:3 1966:3 2000:22 2003:20 2005:7 2018:22 2024:20 2031:5 2032:14 2110:2,5 sorts 2000:1 2002:1 2010:15 2019:15 2021:14 2033:20 sought 1951:8 1958:22 1958:24 sounds 2088:21 sources 1965:12 1966:11 sourcing 2057:24 2062:14,15,18,18 soured 1948:6 South 1939:17 1941:10 1941:23 1942:17 1950:4,5 1953:14 1963:8 1965:14,24,24 1967:9 1983:21 2011:23 2013:14 2014:2 2077:17 2094:15 2099:7 2111:23 2125:16 Southern 1976:4 Sovereign 1943:3,5 space 1980:14 2043:22 2067:25 2090:9 2092:24 spaces 2093:9 speak 2010:12 2073:23 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