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THE HEAD: ORGANISED CRIME
DIRECTORATE FOR PRIORITY CRIME INVESTIGATION
HEAD OFFICE
PRETORIA

24 August 2016

ATT: MAJOR GENERAL M.S. LEDWABA

BY E-MAIL: ledwabam2@saps.gov.za

Dear General Ledwaba,

IN RE: MINISTER PRAVIN GORDHAN

INTRODUCTION

1. We act for Minister Pravin Gordhan. He has asked us to respond to your letter dated 21 August 2016 which was erroneously addressed to Messrs Allan Levin & Associates Attorneys but delivered to our offices.

2. Your request out of the blue, that the Minister give a warning statement on the matters listed in your letter, comes as a surprise for various reasons. First, the head of the Hawks, Lieutenant General Ntlemeza, assured us in his letter of 20 May 2016 that "*the Minister is not a suspect in this investigation*". Second, the Minister has already given his account of the matters listed in your letter. He did so on 18 May 2016 in his response to General Ntlemeza's questions. Third, the assertions of law in your letter under reply are wholly unfounded on any version of the facts.

3. Minister Gordhan has, however, instructed us to be as helpful as possible and to address your questions fully. We accordingly enclose a statement by the Minister giving his account of the facts relevant to the matters raised in your letter. He has asked us to address the assertions of law made in your letter. We do so below.

4. Minister Gordhan is unable to meet with Brigadier Xaba at 14h00 on Thursday 25 August 2016. He in any event has no more to say about the matters raised in your letter under reply. If you require further information, however, you are welcome to approach us again because the Minister has instructed us to assist wherever we can.

THE SARS INVESTIGATION UNIT

5. You say in paragraph 2 of your letter that the Minister facilitated the creation of the SARS investigation unit "*which gathered, collected, evaluated, correlated intelligence contrary to section 3 of the National Strategic Intelligence Act 39 of 1994"*. You are, however, mistaken in your assertion that the section prohibited all intelligence gathering.

6. The relevant part of s 3(1) of the Intelligence Act read as follows at the time when the SARS unit was established (before its amendment in 2013):

> "*If any law expressly or by implication requires any department of State, other than (the NIA) or (SASS), to perform any function with regard to the security of the Republic or the combatting of any threat to the security of the Republic, such law shall be deemed to empower such department to gather departmental intelligence, and to evaluate, correlate and interpret such intelligence for the purpose of discharging such function; provided that such department of State –*
> *(a) …*
> *(b) …*
> *shall not gather departmental intelligence within the Republic in a covert manner …"*.

7. The establishment of the SARS investigation unit did not contravene this provision for the following reasons:

   7.1 Section 3(1) does not impose a general prohibition. It applies only to those departments of state that are required by law to perform functions "*with regard to the security of the Republic or the combatting of any threat to the security of the Republic"*. SARS is not such a department. It was never engaged in national security matters. It was accordingly not subject to the prohibition in s 3(1).

   7.2 Section 3(1) in any event does not prohibit all covert intelligence gathering. It only prohibits the gathering of "*departmental intelligence"* in a covert manner. The Act defined "*departmental intelligence"* as "*intelligence about any threat or potential threat to the national security and stability of the Republic"*. The SARS unit was never engaged in the gathering of intelligence of this kind. Its activities thus fell well beyond the scope of the prohibition because it was not in the business of gathering intelligence about any threat or potential threat to the national security and stability of the Republic.

   7.3 Your interpretation suggests that it is unlawful for anybody to engage in the covert gathering of crime intelligence. But such an interpretation is clearly absurd. Very many public bodies engage in the covert gathering of crime intelligence such as most metropolitan local authorities, SAA, Eskom and Prasa to name but a few.

8. The Minister in any event believed in good faith that the unit was perfectly lawful. So did his successors and all the other state agencies with whom the unit interacted for many years. The Minister was accordingly in any event entirely innocent of any *mens rea*.

MR PILLAY'S EARLY RETIREMENT AND RE-APPOINTMENT

9. We assume that paragraph 3 of your letter refers to Mr Pillay's early retirement and re-appointment. Please let us know if we are mistaken.

10. You seem to suggest that Mr Pillay's early retirement and re-appointment caused "*unauthorised expenditure"* or "*fruitless and wasteful expenditure"* within the meaning of s 1 of the Public Finance Management Act 1 of 1999 and thus contravened s 34 and s 81(2). You are, however, mistaken for the following reasons:

    10.1. The PFMA applies to national and provincial departments of state, the public entities listed in Schedules 2 and 3 and constitutional institutions. SARS is not a department of state. It is a public entity listed in Schedule 3A.

    10.2. Section 34 is part of chapter 4 of the PFMA that deals with "*national and provincial budgets"*. It is not applicable to public entities at all. You are accordingly mistaken in your assertion that s 34 applies to SARS.

    10.3. Section 81(2) applies to officials of departments of state and constitutional institutions. SARS was never a department of state and the Minister was not an official of SARS when Mr Pillay took early retirement and was re-appointed. The section is accordingly not applicable at all.

    10.4. Neither s 34 nor s 81(2) in any event creates a criminal offence. Even if they were applicable, they would accordingly be none of your concern.

    10.5. Your assertion that the Minister's conduct contravened the criminal prohibitions of the PFMA is accordingly wholly unfounded.

11. You also assert without explanation that the Minister's approval of Mr Pillay's early retirement and re-appointment contravened ss 3, 4 and 10 of the Prevention and Combatting of Corrupt Activities Act 12 of 2004. Your assertion is again unfounded for the following reasons:

    11.1. The offence of corruption under ss 3, 4 and 10 of the Corruption Act in the first place requires that the perpetrator "*gives or agrees or offers to give to any other person any gratification"*. The Minister did not give or agree to give gratification to anybody. He merely gave official approval to the proposal of the Commissioner that SARS allow Mr Pillay to take early retirement and be re-appointed.

    11.2. The giving of gratification in any event does not amount to corruption in itself. It is corrupt only if the gratification is given to the recipient "*in order to act, personally or by influencing another person so to act"*, in an unlawful manner. There has never been any suggestion that the Minister approved the Commissioner's proposal that Mr Pillay be allowed to take early retirement and be re-appointed to persuade him to act unlawfully in any way.

11.3. The Minister believed in good faith that the transaction was entirely lawful. It means that he in any event lacked any *mens rea*.

12. We trust that you find the above in order.

Yours faithfully

GILDENHUYS MALATJI INC

Per: Tebogo Malatji

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